IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-99

CHIEF HARRY PARKER
Petitioner,

vs.

JAMES RANDOLPH, WILBURN LEE PICKENS, and ISAIAH HAMILTON
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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SUBJECT INDEX

Page

Table of Authorities Cited ii

Opinions Below 1

Grounds on Which Jurisdiction Is Invoked 2

Constitutional and Statutory Provisions Involved 3

Questions Presented 4

Statement of the Case 5

Reasons for Granting the Writ 9

Argument 12

I. The Court of Appeals for the Sixth Circuit Has Incorrectly Interpreted the Law as Stated by This Court in Bruton, Schneble, and Harrington 12

II. The Court of Appeals' Affirmation of the District Court's Determination That Wilburn Pickens Was Denied Access to Counsel, in Violation of Miranda, Is Erroneous and Violates the Principles of Law Set Out in 28 U.S.C. § 2254(d) 20

Conclusion 26

INDEX TO APPENDIX

Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, Filed May 19, 1978 ..... A-1

Memorandum Decision and Order filed by the United States District Court for the Western District of Tennessee, Western Division, Filed May 2, 1977 ..... A-7

Opinion of the Supreme Court of Tennessee at Jackson, Filed December 15, 1975 ..... A-20

Opinion of the Court of Criminal Appeals of Tennessee at Jackson, Filed June 5, 1974 ..... A-40

TABLE OF AUTHORITIES

Cases

Bruton v. United States, 391 U.S. 123 (1968) 4, 9, 10, 12, 13, 15, 17, 18, 19, 20

Catanzaro v. Mancusi, 404 F.2d 296, cert. denied 397 U.S. 942 (1970) 10, 17, 18, 19

Harrington v. California, 395 U.S. 250 (1969) 4, 9, 10, 12, 13, 15, 18, 19, 20

LaVallee v. Delle Rose, 410 U.S. 695 (1973) 342 Fed. Supp. 567, 468 F.2d 1288 .....11, 24, 25, 26

Mack v. Maggio, 538 F.2d 1129 (5th Cir. 1976) 10, 19

Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971) 10, 17, 19

Miranda v. Arizona, 384 U.S. 436 (1966) 20, 21, 22, 23

Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973) 10

Schneble v. Florida, 405 U.S. 427 (1972) 4, 9, 10, 13, 15, 18, 20

Townsend v. Sain, 372 U.S. 293 (1963) ..10, 11, 23, 24, 25, 26

United States v. Digilio, 538 F.2d 972 (3d Cir. 1976) ..10, 19

United States v. Spinks, 470 F.2d 64 (7th Cir. 1972) ..10, 18

United States v. Walton, 538 F.2d 1348 (8th Cir. 1976) 10, 18, 19

Other Authorities

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(d) 3, 5, 10-11, 20, 21, 23, 24, 25, 26

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To the United States Court of Appeals for the Sixth Circuit

The Petitioner, Chief Harry Parker, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered in this proceeding on May 19, 1978, wherein the Court of Appeals affirmed the United States District Court which has issued the writs of habeas corpus for the respondents, three prisoners incarcerated by the State of Tennessee.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978,

is styled *Randolph, et al. v. Parker*, Nos. 77-1463-65, and is attached hereto as Appendix "A".

The case arose as separate petitions for federal habeas corpus relief which were consolidated in the United States District Court for the Western District of Tennessee, Western Division. At the district level these cases were styled *James Randolph v. Chief Harry Parker*, Civil C-76-68; *Wilburn Pickens v. Chief Harry Parker*, Civil C-76-69; and *Isaiah Hamilton v. Chief Harry Parker*, Civil C-76-310. On May 2, 1977, Chief Judge Brown entered a memorandum decision which is attached hereto as Appendix "B".

The opinion of the Supreme Court of Tennessee, reversing the Tennessee Court of Criminal Appeals, and affirming the convictions of the respondents, was filed on December 15, 1975 and a copy is attached hereto as Appendix "C". The opinion of the Tennessee Court of Criminal Appeals, reversing the convictions of the respondents, was filed on June 5, 1974 and is attached hereto as Appendix "D". None of these opinions are reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978. The State did not file a petition to rehear. This petition is timely filed within ninety (90) days of the date of decision. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d).

"State Custody; remedies in Federal courts.—

* * * * * * *

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Harrington v. California*, 395 U.S. 250 (1969).

2. Whether the United States Court of Appeals and the District Court have violated 28 U.S.C. § 2254(d), by finding that one of the respondents was denied his right to counsel.

STATEMENT OF THE CASE

The two questions before this Court are questions of law. However, the following summary of facts is submitted so that this Court may be well acquainted with the factual basis upon which the three respondents were convicted in state court. Other summaries of facts appear in the opinion of the Court of Criminal Appeals (Appendix D), the opinion of the Supreme Court of Tennessee (Appendix C), the Magistrate's preliminary report, the District Court's memorandum decision (Appendix B), and the memorandum decision of the United States Court of Appeals, Sixth Circuit (Appendix A).

The three respondents were convicted for the participation in the murder and robbery of William Douglas, in Memphis, on July 6, 1970. Mr. Douglas was a professional gambler who had, for some time prior to his murder, been winning money from Robert Wood, one of the respondents' co-defendants in state court. Mr. Douglas, by using marked playing cards, had cheated Robert Wood out of approximately $5,000 in three poker games set up between the two, spanning the three weeks prior to the Douglas murder.

Robert Wood suspected that he was being cheated and enlisted his brother, Joe Wood, also a co-defendant at the trial, in a scheme to recoup his losses. The scheme was for Robert to set up a game with Douglas, and for his brother, Joe, and the three respondents to rob the game, and thus recoup some of Robert's losses. Prior to the night of the murder, Joe took two of the respondents, Hamilton and Pickens, to the scene of the game, pointed out to them the particular apartment

where the game would be played, promised them $3,000 to $4,000 to rob the game, and also told them that he would be inside in the game and would kill Douglas, if he had to. James Randolph was enlisted by Joe Wood to participate in the scheme on the night of the murder, July 6, 1970.

On the night Robert Wood and William Douglas began playing poker at approximately 7:30 p.m. Joe Wood and one Tommy Thomas sat in the same room as spectators. Sometime before 9:00 p.m., Joe Wood announced he was going to get some beer. While allegedly obtaining beer, Joe Wood met with the three respondents. After a brief meeting, a trip to a nearby restaurant, the purchase of some beer, and the positioning of their automobiles, the four men approached the apartment. Those inside heard people approaching and Douglas, fearing a break-in, armed himself with a shotgun. Joe Wood convinced Douglas he was alone, and his three companions returned to their automobiles. Douglas made Joe Wood crawl through a small window next to the door. Once Joe Wood was back in the room, Douglas resumed the poker game. The game was resumed for some five to ten minutes when Joe Wood arose and asked permission to go to the bathroom. He came out of the bathroom armed with a gun and walked behind Douglas, ordering Thomas and Douglas to lie on the floor. Joe Wood then handed the gun to his brother, and ran out the door, leaving it open. Thomas, in an effort to avoid the shooting, arose from the floor, closed the door and attempted to talk to Robert Wood. Douglas then made a move for the pistol in his belt and Robert Wood killed him. Within seconds, the three respondents kicked in the door and one of the three fired a shot at Robert Wood. The record shows that Joe Wood had summoned them when he ran from the apartment. One of the respondents then searched Thomas and took from him a knife and $80.00. Robert Wood then took all the money on the table and stuffed it in his pockets. Everyone then left with the exception of Thomas, who remained behind

with Douglas. Robert and Joe Wood, Isaiah Hamilton, and James Randolph went to the apartment of Hamilton where they hid the weapons and split the money, with Hamilton and Randolph receiving $50.00 apiece. Pickens did not go to the Hamilton apartment, and received no money.

Subsequent to this incident all five co-defendants were either arrested or surrendered themselves to the Memphis police. Statements were taken from all except Joe Wood. At trial only Robert Wood took the stand. The statements of Hamilton, Pickens, Randolph and Robert Wood, all found by the trial judge to have been given freely and voluntarily, were admitted into evidence through the testimony of several police officers of the Memphis Police Department. In an effort to comply with *Bruton*, the trial court and all counsel diligently attempted a program of redaction for each of the statements.

On July 25, 1972, the two Woods and the three respondents were found guilty of murder in the perpetration of a robbery, in the Criminal Court of Shelby County (Memphis), Tennessee. Punishment for each was set at life in the state penitentiary. These convictions were appealed to the Court of Criminal Appeals of Tennessee and, on June 5, 1974, the Court of Criminal Appeals rendered a divided decision reversing the convictions of all five defendants. The State petitioned to the Supreme Court of Tennessee and certiorari was granted. On December 15, 1975 the Supreme Court of Tennessee rendered a per curiam opinion reversing the Court of Criminal Appeals and affirming the convictions.

In February of 1976 Wilbur Pickens and James Randolph sought resort to the federal courts by filing petitions for the writ of habeas corpus. On March 17, 1976 the State responded to the cases of Randolph and Pickens. Subsequently, Isaiah Hamilton petitioned for the writ of habeas corpus and his case was consolidated with that of the other two respondents. The cases

were referred to a Magistrate for report. After several responses by the State and several references to the Magistrate, an evidentiary hearing was set by Chief Judge Brown and held in Memphis on April 29, 1977. On May 2, 1977 Chief Judge Brown rendered a memorandum decision concluding that the admission into evidence of Pickens' confession was constitutional error in that it violated his rights as set out in the *Miranda* case. Judge Brown also found that the rights of all three petitioners pursuant to the *Bruton* doctrine were violated, and the Court was unable to conclude that this violation was harmless error. A judgment was entered in accordance with the memorandum decision and the State was ordered to discharge the petitioners from custody unless they were retried within a reasonable time, or a timely appeal was taken.

A timely appeal was taken by the State to the Court of Appeals for the Sixth Circuit and on May 19, 1978 the United States Court of Appeals rendered a decision affirming the District Court.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has voided three first degree murder convictions, obtained six and one-half years ago. The State of Tennessee is very much aggrieved by the decision of the Sixth Circuit and submits that this decision is based upon a misinterpretation of certain decisions of this Court and, further, clearly conflicts with federal statutory law.

The Sixth Circuit's decision is primarily based upon a finding that the respondents' constitutional rights, as enunciated by this Honorable Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner/State has maintained throughout the federal proceedings that the doctrine of *Bruton* is inappropriately applied to this case. The case sub judice is much more analogous to the factual situation before this Court in *Schneble v. Florida*, 405 U.S. 516 (1972) and *Harrington v. California*, 395 U.S. 296 (1969). In *Bruton* there was one confession and no testimony by either co-defendant. In this case, there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant. In both *Schneble* and *Harrington*, the parties raising the *Bruton* objection had confessed themselves. The same is true in this case. This distinction is important since a reviewing court considering the issue of harmless error must consider the confessor's confession against himself. This case should not be labeled a *Bruton* case. The case before this Court is a *Schneble* or a *Harrington* case, if it must be labeled at all.

There has existed for some time considerable split and confusion among the various circuits as to the application of *Bruton* to facts which are not on point with *Bruton*. Simply stated, if the case sub judice had arisen in another circuit, then the decision quite probably would be different. This split among the circuits is expressly recognized in the Sixth Circuit opinion.

Judicial attempts in the various circuits to distinguish cases such as the one sub judice from *Bruton* have resulted in the evolution of the interlocking confession theory, which has been impliedly sanctioned by this Court. *See Catanzaro v. Mancusi*, 404 F.2d 296 (1968), *cert. denied*, 397 U.S. 942 (1970). There is considerable disagreement as to whether the interlocking confession theory is in reality a finding that *Bruton* is inapplicable to such cases, or whether the theory is an application of *Harrington* and, thus, in reality a finding of harmless error. *See Ortiz v. Fritz*, 476 F.2d 37 (2d Cir. 1973). The first position contends that *Bruton* simply does not apply to situations where both defendants confess and the confessions interlock. The second position contends that *Bruton* does apply but the violation is harmless error in light of the two interlocking confessions. The practical effect of both positions is the same. Further, and more important, the adoption of either theory would result in a different decision than reached in this case by the Sixth Circuit. Additionally, the Third, Fifth, Seventh, Eighth and Tenth Circuits have also rendered decisions which conflict with the decisions of the Sixth Circuit and seemingly would produce a different result than reached here. *See United States v. Digilio*, 538 F.2d 972 (3d Cir. 1976); *Mack v. Maggio*, 538 F.2d 1129 (5th Cir. 1976); *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972); *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976); *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971).

The petitioner/State contends that the opinion of the Sixth Circuit is in obvious conflict with opinions rendered by other circuit courts in similar cases. Further, the petitioner contends the decision of the Sixth Circuit results from a misinterpretation of this Court's decisions in *Bruton, Schneble*, and *Harrington*. The writ of certiorari should be granted by this Court to clear up the confusion which has resulted from the judicial attempts to apply *Bruton* to differing facts.

The United States Supreme Court decision in *Townsend v. Sain*, 372 U.S. 293 (1963), is a precursor of 28 U.S.C.

§ 2254(d). In *Townsend*, this Court set forth general standards governing the holding of hearings on federal habeas corpus petitions. Those standards now appear in 28 U.S.C. § 2254(d). Under the standards laid down in *Townsend* and embodied in 28 U.S.C. § 2254(d), a determination made on the merits of a factual issue by a state court of competent jurisdiction is entitled to a presumption of correctness in a federal habeas corpus proceeding unless the applicant for the writ can prove one or more of the first seven standards listed in § 2254(d), or unless the federal court concludes that the record in the state court proceeding, considered as a whole, does not fairly support the factual determination. In *LaVallee v. Delle Rose*, 410 U.S. 695 (1973), this Court further elaborated on *Townsend* and 28 U.S.C. § 2254(d). In *LaVallee*, the admissibility of a confession was at issue. The same issue was before the District Court in this case. Similar to *LaVallee*, the admissibility of the confession in this case revolved around one basically important issue—credibility. In *LaVallee*, this Court rejected an overly technical application of *Townsend* and recognized the simplicity of the major issue. This Court reversed the Second Circuit and the District Court and reinstated the factual determination made in state court. The same problem exists in this case since the Sixth Circuit has affirmed a District Court determination wherein the District Judge redetermined a factual issue previously decided in the State's favor, in state court. Thus, the Sixth Circuit opinion is erroneous and violates the principles of law set out in 28 U.S.C. § 2254(d) and elucidated in *Townsend* and *LaVallee*. For this additional reason, the writ of certiorari should issue.

ARGUMENT

I

The Court of Appeals for the Sixth Circuit Has Incorrectly Interpreted the Law as Stated by This Court in Bruton, Schneble and Harrington.

The primary basis upon which the Court of Appeals' decision rests is a finding that the respondents' constitutional rights, as enunciated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner/State respectfully submits that the Court of Appeals incorrectly applied *Bruton* to this case.

In *Bruton*, Bruton and one Evans were jointly tried and convicted of armed postal robbery. Neither testified upon their trial. Bruton made no admissions or confessions. However, Evans did confess to the postal authorities that he and Bruton committed the robbery in question and upon trial Evans' confession, including the portion which implicated Bruton, was received into evidence. This Court reversed Bruton's conviction and held that his rights under the confrontation clause of the Sixth Amendment had been violated because there was a substantial risk that the jury, despite instructions to the contrary, had looked to the incriminating statements made by Bruton's co-defendant.

The next year this Court decided the case of *Harrington v. California*, 395 U.S. 296 (1969). In *Harrington*, this Court, with Mr. Justice Douglas writing, held that a *Bruton* type violation can constitute harmless error. In *Harrington*, four men were tried together—Harrington, a caucasian, and Bosby, Rhone, and Cooper, who were black. All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each of Harrington's co-defendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone testified, and Harrington's counsel cross-examined him. The other two individuals did not take the stand. These facts are analogous to the case now before this Court. Here, three black men and two white men have been convicted of murder in the perpetration of a robbery. Four of the individuals tried in state court made confessions which were admitted at trial. One of the individuals here, Robert Wood, testified at trial and was cross-examined by the respondents' lawyers. Much of the other evidence existing in the record identifies individuals as three blacks and a white man. This is the same sort of other evidence which existed in the *Harrington* case. In reaching a finding of harmless error in *Harrington*, this Court stated:

> "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We, of course, do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the mind of the average juror."

See Harrington, supra, 89 S.Ct. at 1728.

In 1972 this Court decided the case of *Schneble v. Florida*, 405 U.S. 516 (1972). In *Schneble*, Schneble and his co-defendant Snell were tried jointly in a Florida state court for murder. Police officers testified to a detailed confession that Schneble had given to them and one officer related a statement related to him by Snell. The statement of Snell, who did not testify, tended to undermine Schneble's initial version and to corroborate certain details of Schneble's confession. This Court confirmed the conviction of Schneble, finding any violation of *Bruton* was harmless error beyond a reasonable doubt in view of the over-

whelming evidence of petitioner's guilt as manifested by his confession, which completely comported with the objective evidence and the comparatively insignificant effect of the co-defendant's admission. *See Schneble, supra,* 92 S.Ct. at 1057, 1058-1060. In reaching this conclusion of harmless error this Court stated:

> ". . . without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually non-existent. The remaining evidence in the case —the disappearance of Mrs. Collier sometime during the trip, and Snell's statement that Schneble sat in the back seat of the car during the trip and never left Snell alone with Mrs. Collier—could not by itself convict Schneble with this or any other crime."

See Schneble, supra at 1059.

In *Schneble* neither co-defendant testified. What was important was the internal consistency of Schneble's confession, the corroboration by other evidence, and the lack of contradiction in the record. Most important, was the confession of Schneble which this Court, expressly stating there was little else, found to be a large measure of the overwhelming evidence against him. In the instant case, both the Magistrate's report and the opinion of the Supreme Court of Tennessee reflect findings that the confessions of Hamilton, Pickens and Randolph are essentially alike in material details and are corroborative of one another. For the purposes of this case, the lessons of *Schneble* are twofold. First, each of the respondent's own confession must be considered as part of the quantum of proof in reaching a determination of harmless error. Second, the consistency and corroborative nature of the respondent's confessions must be considered in deciding whether the confession of a non-testifying co-defendant could have significantly affected the jury's verdict. Obviously, the implication of *Schneble* is that confessions which are corroborative and consistent do

little more than the individual's own confession has already done.

The case before this Court is much more analogous to *Harrington* and *Schneble* than to *Bruton*. The Court of Appeals for the Sixth Circuit erred in strictly applying *Bruton* to this case. In *Bruton* there was one confession and no testimony by either co-defendant. In this case there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant, Robert Wood. *Bruton* did not confess. Since the only confession in *Bruton* was that of Evans, a harmless error determination, which was not at issue, would have had to be made on proof other than any confession. In *Schneble* and *Harrington* the parties raising the *Bruton* objection had confessed themselves. The same is true in the case sub judice. This distinction is important since a reviewing court considering the issues of harmless error must consider the confessor's confession against himself. As Mr. Justice White stated in *Bruton*, "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." The distinctions are evident. This case should not be labeled a *Bruton* case.

The petitioner/State contends that under the authority of *Schneble* and *Harrington* there is ample evidence in this record to mandate a finding of harmlessness. The Court of Appeals' finding to the contrary is inconsistent with this Court's decisions in *Schneble* and *Harrington*. In reaching a decision in *Schneble* and *Harrington*, it is patently obvious that this Court considered the defendant's own confession against himself and also considered the testimony of the co-defendant who took the stand and was cross-examined. Therefore, these two pieces of evidence automatically should become part of the quantum of proof necessary to find harmless error. In fact, the only evidence in the record which is struck from the equation is the substantive

content of the non-testifying co-defendants' confessions. However, the fact these confessions are corroborative and consistent should be considered. Applying these principles to the instant case, the proof against respondent includes his own confession, the incriminating confession and testimony of a testifying co-defendant, the fact of corroboration and consistency in the excluded confessions, and all the other evidence[1] in this record. Using this formula to determine what evidence should be considered, a reviewing court should then determine what was the probable impact of the two confessions on the mind of an average juror. Using this formula, which is drawn from the *Schneble* and *Harrington* decisions, the decision of the Court of Appeals is erroneous. The most reasonable conclusion is that any error committed in the admission of the two non-testifying co-defendants' confessions is clearly harmless.

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[1] The following is a summary of the other evidence which is contained in the record: 1. Mr. Tommy Thomas, the individual who was inside when the shooting and robbery occurred, testified at trial. His testimony is harmonious and corroborative of the entire chain of events set out in the confessions. Mr. Thomas made no specific identification of Pickens, Hamilton, or Randolph. He only identified them as three negroes (State Record, p. 60, et seq.). 2. Mr. Robert Wood, the confessing co-defendant, testified at trial. Mr. Wood simply imposed a defense of self-defense which the jury apparently did not believe. Mr. Wood's testimony was consistent with the entire scheme of events and he identified Pickens, Hamilton, and Randolph as participants in the criminal episode (State Record p. 884, et seq., 912). 3. Five other witnesses testified as to facts they observed at the time of the crime. These facts were, in whole, consistent with the state's theory of the case. Although none of these individuals could specifically identify the respondents, they all testified to seeing individuals, whose descriptions were consistent with the state's theory, at the scene of the crime when it was committed. For example, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment after the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing a "white man and three blacks" at the apartment at the time the crime was committed. 4. Numerous other witnesses were produced by the state and testified to facts consistent with the state's theory of the case and consistent with the three confessions of the respondents.

In *Catanzaro v. Mancusi*, 404 F.2d 296 (1968), three individuals were tried and convicted of murder in New York state court. The confession of Catanzaro and his non-testifying co-defendant, McChesney, were admitted at the joint trial. Catanzaro sought a writ of habeas corpus and relied upon *Bruton*. The Second Circuit denied the writ and affirmed the conviction, stating:

> "The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a co-defendant who did. In our case Catanzaro himself confessed and his confession interlocks and supports the confession of McChesney.
>
> Where the jury has heard not only a co-defendant's confession, but the defendant's own confession, no such devastating risk attends the lack of a confrontation as what was thought to be involved in Bruton."

See Catanzaro, supra, at p. 300.

Simply stated, the Second Circuit in *Catanzaro* refused to apply the sanctions of *Bruton* because of the distinctions between that case and *Bruton*. The distinctions were confessions by both defendants, instead of only one, and the interlocking nature of the confessions. The Second Circuit recognized that such factors distinguish a case from *Bruton*, but the Sixth Circuit has failed to make that distinction in this case. This Court denied certiorari in *Catanzaro*. See 397 U.S. 942, 90 S.Ct. 956 (1970).

In *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971) two state co-defendants had been tried and convicted of murder. Both had made complete confessions which were admitted at trial with instructions that such were admissible only against the declarant. In a habeas corpus proceeding the district court

granted the petitions under the authority of *Bruton*. The Tenth Circuit reversed the district court and stated: "We need not concern ourselves with the legal nicety as to whether the instant case is without the *Bruton* rule, or is within *Bruton* and the violation thereof constituting only harmless error. In either event the judgment of the trial court (district court) must be reversed." In reversing the district court, the Tenth Circuit discussed and was persuaded by the rationale of both *Harrington* and *Catanzaro*.

In *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972) Spinks and one Turner were tried together and convicted of robbery in federal court. Spinks and Turner had both given confessions with no substantial factual differences. The other three individuals involved in the robbery did not confess and apparently their trials were severed for this reason. Turner's confession implicated Spinks and Turner did not testify. In affirming the conviction the Seventh Circuit cited *Catanzaro*, *Schneble*, and *Harrington*, and further stated:

> "There is no merit in Spinks' claim that he was prejudiced by denial of the right to cross-examine Turner. It would be ludicrous to have Spinks trying to break down Turner's confession, which implicated Spinks, while Spinks' own confession remained unchallenged, and even if Turner's confession had been excluded from the evidence—or even if Spinks' motion for severance had been granted—Spinks would still be faced with his own confession."

See Spinks, supra, at 66.

In *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976) the two defendants had been convicted in District Court of armed robbery. Both defendants confessed, and both confessions, implicating the other defendant, were admitted at trial. There was no redaction in the confessions. Neither defendant testified at trial. The Eighth Circuit affirmed the conviction and

the opinion does much to elucidate the law relating to interlocking confessions, *Bruton*, and *Harrington*. The Eighth Circuit stated: "It is now well established that *Bruton* does not automatically call for a reversal where interlocking confessions of a co-defendant tried at the same time are admitted in evidence, and that there should be no reversal where the appellate court is convinced that a complaining defendant was not subjected to a substantial risk of incurable prejudice as a result of the admission of his co-defendant's confession." *See Walton, supra* at 1353.

In reaching this conclusion in *Walton* the Eighth Circuit, like the Tenth Circuit in *Metropolis* found that from a practical standpoint it made no difference whether the Court held the admission of the confessions was not erroneous or whether they found the error harmless beyond a reasonable doubt. The Eighth Circuit also cited both *Harrington* and *Catanzaro* in supporting their decision.

In *Mack v. Maggio*, 538 F.2d 1129 (5th Cir. 1976), three co-defendants had confessed in the same crime. The confessions interlocked with only slight variances, and they were admitted with none of the confessors testifying. Two of the state prisoners sought federal habeas corpus relief which was refused by the district court. The Fifth Circuit affirmed and found that *Bruton* was inapplicable to such situations.

In *United States v. Digilio*, 538 F.2d 972 (3rd Cir. 1976) three men, Digilio, Lupo, and Szwandrak were convicted in the United States district court for conspiracy. Statements taken by the F.B.I. from Lupo and Szwandrak were admitted at the joint trial. These statements were redacted when read to the jury and neither Lupo or Szwandrak testified. All references to Digilio were deleted. The Third Circuit expressly disapproved of the suggestion that there is "a parallel statement" exception to the *Bruton* rule. Nevertheless, the Third Circuit affirmed the con-

viction on the basis of harmless error and in doing so mentioned a corroborative effect of the consistent confessions.

Although the above cited Circuit Courts differ somewhat in reaching their conclusions, the basic conclusion is consistent and clear—confessing co-defendants whose confessions are consistent and corroborative do not stand in the same shoes as Mr. Bruton. This result reached by the Second, Third, Fifth, Seventh, Eighth and Tenth Circuits, is contrary to the result reached in the case sub judice by the Sixth Circuit. *Bruton* is a specific case with specific facts and its application has not been extended since the decision in 1968. *Bruton* should not be applied to the factual situation before this Court. The Sixth Circuit's decision in this case conflicts with the decisions reached in at least six other circuits and with the decisions of this Court in *Schneble* and *Harrington*.

II

The Court of Appeals' Affirmation of the District Court's Determination That Wilburn Pickens Was Denied Access to Counsel, in Violation of Miranda, Is Erroneous and Violates the Principles of Law Set Out in 28 U.S.C. §2254(d).

Throughout his quest to avoid conviction and punishment for the crime in which he participated, Wilburn Pickens, one of the respondents, has repeatedly asserted that his written statement was taken in violation of his constitutional rights as enunciated by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Pickens has alleged in state and federal court, that after his arrest he was threatened with physical harm by police officers on three occasions, deprived of his reading glasses so he could not read the statement, and denied access to counsel by police despite his request for counsel. Mr. Pickens raised these questions in the state trial court to no avail. His lawyers assigned these issues to the Court of Criminal Appeals of Tennessee and

to the Supreme Court of Tennessee, to no avail. Mr. Pickens raised these same issues in his federal habeas corpus application and first found relief in the district court's determination that he was denied access to counsel prior to interrogation. The Sixth Circuit Court of Appeals affirmed this determination and the petitioner/State contends this affirmation is erroneous and violates 28 U.S.C. § 2254(d).

As the record demonstrates, Mr. Pickens, after his arrest actually made two statements, one oral and one written. The admission of the oral statement was prevented at trial because the State had not supplied Mr. Pickens' counsel with a copy thereof. A redacted version of the written statement given by Pickens was admitted at trial. The admission of the redacted version of Pickens' statement occurred only after a lengthy state court hearing, held without the jury, during which testimony was heard from Pickens, his attorney, and six members of the Memphis Police Department. (See State Record, pp. 348-416). Throughout this hearing, Pickens contended that the admission of the statement violated the principles of *Miranda* because he had requested counsel and was denied access to counsel. Also, Pickens contended that he had indicated an unwillingness to cooperate and the police continued their interrogation. During the testimony of the six police officers each of them was asked whether Pickens requested counsel prior to interrogation or whether he was denied access to counsel. The testimony of each and every one of these officers clearly and consistently established that Pickens did not request counsel prior to interrogation, was fully advised of his right to counsel, and was, in fact, allowed the opportunity to contact counsel if he so desired. (See State Record, pp. 349-351, 353, 355, 357, 359-361, 365-367, 404-406, 408-411, 414-415). The testimony of these officers established that Pickens was advised on numerous occasions of his constitutional rights, he was further given an opportunity to utilize the telephone, waived this opportunity in writing, and he never made any request whatsoever or indicated

any desire to communicate with his attorney prior to making his statement.

In the face of this testimony Pickens offered only his own interested version of the facts and the testimony of his lawyer, who was not present prior to the statement. The only evidence which the lawyer could offer concerns a conversation he had with Pickens prior to his arrest.

Therefore, the issue before the State trial judge was very simply one of credibility. The issue was crystal clear—did Pickens request access to counsel? Six police officers said he didn't, he said he did, and his lawyer said he had told him to do so in such a situation. The judge heard the testimony, viewed the demeanor of the witnesses, knew the interest of those testifying, and found that *Miranda* had not been violated, and the statement was admissible. Simply stated, the judge decided not to believe Pickens and was not convinced by his testimony. In reversing the trial court on other grounds, the Tennessee Court of Criminal Appeals considered this assignment and found it without merit. The Supreme Court of Tennessee reversed the Court of Criminal Appeals and in doing so, impliedly agreed with the determination made by the Court of Criminal Appeals and the trial court as to the admissibility of the statement.

Pursuant to the habeas corpus proceeding, an evidentiary hearing was held in Memphis, Tennessee on April 29, 1977. The evidentiary hearing did nothing to extend the scope of the State trial court's hearing, produced no other evidence or witnesses which were not before the trial court, and simply consisted of Mr. Pickens and his attorney attempting to recount their state trial testimony almost five years after testifying in state court, and almost seven years after the facts occurred. The State did not call any witnesses. The Memphis police officers who were still available were placed on call and offered to opposing counsel if they so desired. This offer was

refused and the State submitted and relied upon the state court transcript from the original hearing. Therefore, the record before the district court was exactly what was before the state trial court. Furthermore, Pickens testimony in federal court was filled with inconsistencies as he attempted to recount his trial testimony some five years later.[2]

In his memorandum opinion, the District Judge concluded, after the evidentiary hearing, that Pickens was denied access to his attorney and the admission of his confession was constitutional error in that it violated *Miranda*. The District Court's action simply amounts to a reevaluation of the evidence. This procedure is nothing more than a reweighing of the evidence in a factual controversy that has already been determined in a more complete hearing. The district court redecided the credibility issue with regard to the access to counsel issue, and held contrary to the state court even though the district court hearing was not as complete. The Sixth Circuit affirmed.

This Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963), is the precursor of 28 U.S.C. § 2254(d). In *Townsend* this Court set forth general standards governing the holding of hearings on federal habeas corpus petitions. Those standards now appear in 28 U.S.C. § 2254(d). Under the standards laid down in *Townsend* and embodied in 28 U.S.C. § 2254(d), a determination made on the merits of a factual issue by a state court of competent jurisdiction is entitled to a presumption of correctness in a federal habeas corpus proceeding unless the applicant of the writ can prove one or more of the first seven standards listed in § 2254(d), or unless the federal court concludes that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination.

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[2] Numerous discrepancies occur in Pickens' testimony in federal court. These inconsistencies occur even though the State trial record was filed with the federal court and was available to Pickens months before his testimony.

In *LaVallee v. Delle Rose*, 410 U.S. 695 (1973), this Court further elaborated on *Townsend* and 28 U.S.C. § 2254(d). In *LaVallee* the District Court for the Southern District of New York held that the state trial judge had not made an adequate determination within the meaning of 28 U.S.C. § 2254(d), which would have entitled the state court's finding to a presumption of correctness and placed the burden on petitioner to establish by convincing evidence that the state court's conclusions were erroneous. The district court, therefore, held its own hearing, found the confessions there involuntary, and ordered the applicant discharged or retried. A divided panel for the Second Circuit affirmed. *See LaVallee, supra*, at 1204; *See also* 342 Fed. Supp. 567 and 468 Fed.2d 1288. This Court reversed in a situation somewhat analogous to the case sub judice.

The admissibility of the confession at issue in *LaVallee*, like the admissibility of the confession in this case, revolved around basically one important issue—credibility. Simply stated, as this Court recognized in *LaVallee*, the confession of the applicant in *LaVallee* would have to be suppressed if the applicant's version of the facts were believed. Accordingly, the confession was admissible if the trier of facts chose not to believe the applicant's version. The district court and the court of appeals in *LaVallee* both based their decisions on what they perceived to be an inability to ascertain exactly the reasoning of the state trier of fact. This Court rejected this overly technical application of *Townsend* and, recognizing the simplicity of the major issue before the state trier of fact, reversed the Second Circuit.

Even the dissenting justices in *LaVallee* recognized that an overly technical application of *Townsend* was not intended by this Court. In dissent, Mr. Justice Marshall stated:

> "The precise problem encountered by the courts below in evaluating the state court's conclusion—a problem which the court now effectively ignores—is that the issue of voluntariness in this case presents just the sort of difficult mixed question of law and fact which *Townsend* recognized would make federal courts speculation concerning the basis for unreasoned state court action wholly inappropriate. To be sure, where, for instance, a defendant alleges simply that a confession was extracted from him by means of a physical beating administered by the police, it is obvious that if the defendant's story is believed the confession would be involuntary. Thus, even if a state court holds the defendant's confession to be voluntary without articulating any reasons, a federal district court may safely assume that in such an uncomplicated situation the state court's determination resulted from a rejection of defendant's factual allegations."

See LaVallee, supra, 93 S.Ct. 1203, 1207, 1208.

This case is analogous to the situation before this Court in *LaVallee*. In both cases a district judge has taken a factual determination reached by a state trier of fact at a hearing which complies with the mandate of *Townsend*, and substituted his own judgment. In both cases the basic issue boiled down to one of credibility. However, for at least two reasons, the district court decision in the instant case is more peculiar than the district court decision reached in the *LaVallee* case. First, in the instant case, as mentioned above, the District Judge, with the exact same evidence before him, found he was prohibited by § 2254(d) from reviewing the other factual questions regarding Pickens' confession. Second, the District Judge in *LaVallee* apparently found, prior to the District Court evidentiary hearing, that the presumption of correctness in § 2254(d) did not apply. In the instant case the District Judge made no such finding until after the evidentiary hearing. Thus, the State entered the evidentiary hearing assuming reliance upon the presumption of correctness. Obviously, the State was operating without a presumption of correctness since a contrary decision was returned without the

admission of anything new. The federal proceeding was simply a presentation of a part of the evidence heard in state court. The result is clearly erroneous and violates the principles of law set out in 28 U.S.C. § 2254(d) and elucidated by this Court in *Townsend* and *LaVallee*.

CONCLUSION

For all these reasons, the State of Tennessee, through Chief Harry Parker, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Nos. 77-1463-65

United States Court of Appeals
For the Sixth Circuit

James Randolph, Wilber Pickens, Isaiah Hamilton,
Petitioners-Appellees,
v.
Chief Harry Parker,
Respondent-Appellant.

Appeals from the United States District Court for the Western District of Tennessee.

Decided and Filed May 19, 1978.

Before: Edwards, Peck and Keith, Circuit Judges.

Edwards, Circuit Judge. This appeal involves a sequence of events which have the flavor of the old West before the law ever crossed the Pecos. The difference is that here there are no heroes and here there was a trial.

In July of 1970 a Las Vegas gambler named William Douglas came to Memphis with dob[1] and gun and an assumed name. Using the services of a runner with the improbable name of Woppy Gaddy, who had been promised a cut of the take, Douglas was introduced to Robert Wood, a sometime Memphis gambler. In three evenings of gambling with cards marked by Douglas, Wood was relieved of $5,000. He was also filled with

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[1] A dob is a device (which Douglas wore under his collar) which contained a preparation for marking cards so that the professional dobber could read their backs, but his amateur opponent could not.

suspicion and plans for recoupment. A fourth encounter of a similar kind left Douglas dead on the floor from a pistol shot fired by Robert Wood, and Robert Wood in possession of some of the money he had lost. In the long denouement, it also resulted in life sentences for murder for Robert Wood, Joe Wood, his brother, and three other Memphis men who are the subjects of this appeal.

These habeas corpus petitions, filed by Randolph, Pickens and Hamilton, were heard in the United States District Court for the Western District of Tennessee and resulted in the issuance of three writs of habeas corpus requiring the state to discharge petitioners unless they are promptly retried. The writs were issued by Chief Judge Bailey Brown of the Western District who, after evidentiary hearings, found violations of the right of confrontation guaranteed by the Sixth Amendment of the United States Constitution as to all three petitioners in their joint state court felony murder trial. Judge Brown based his ruling on the holding of the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968). He also found violation of petitioner Pickens' right to counsel, as guaranteed by the Sixth Amendment under the Supreme Court's interpretation of *Miranda v. Arizona*, 384 U.S. 436 (1969).

On review of the entire record of the federal habeas hearing and the prior state trial, we find ample support for the District Judge's findings of fact, and we agree with his well-reasoned conclusions of law. We affirm.

We recite the state's theory of this case from the District Judge's summary thereof:

> In July, 1970, Robert Woods had lost a considerable amount of money in head-to-head card games with one Douglas and had become convinced that Douglas had been cheating him. In anticipation of still another game, Robert asked his brother, Joe Woods, to arrange to "have the game robbed," and in this way regain most, if not all, of what he had lost. Joe Woods then enlisted petitioner Hamilton, an employee of his, who associated petitioners Randolph and Pickens,[2] to carry out this venture. While the card game was in progress, petitioners, by pre-arrangement, were waiting in the vicinity of the apartment where it was being held. Joe Woods and one Tommy Thomas were in the apartment watching the game. Joe left the apartment and brought petitioners back with him, but failed to gain entrance for them when Douglas, hearing strange noises in the hallway, refused to allow the door to be opened. However, later, after petitioners had returned to their place of waiting, Joe did obtain admission for himself into the apartment. Shortly thereafter, Joe pulled a pistol on Douglas and Thomas, and then, handing the pistol to Robert Woods, went to tell petitioners to move in on the game. (Obviously, matters were not going according to plan.) Before petitioners reached the apartment, however, Douglas went for his pistol with the result that Robert Woods shot and killed him. Within seconds after the shooting, Joe and the petitioners knocked the apartment door down and entered, Robert then took all of the cash, and later petitioners Hamilton and Randolph (but not petitioner Pickens) were paid $50.00 for their participation.

The state's problems of proof in relation to the two Wood brothers were quite different from those applicable to the current petitioners. Witness Thomas testified explicitly to Douglas' method of cheating Robert Wood at cards and to his (Thomas') complicity in it. He also testified to Joe Wood's producing a pistol (after Robert Wood accused Douglas of cheating him) and that Joe Wood handed the gun to Robert and ran out of

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[2] All three petitioners in this case are black, whereas all the card players and watchers were white.

A police officer was allowed to testify, over objection, to an oral statement by Randolph that a coconspirator (presumably Joe Wood) had told Randolph "that the money was going to be taken even if he had to kill" Douglas.

the room. Thomas then testified that with only himself, Douglas and Robert Wood in the room, he heard a shot and saw Douglas fall fatally wounded.

Robert Wood was the only one of the five codefendants who testified before the jury at the state court trial. Although he had originally given the police a statement which obviously sought to accuse outsiders to the poker game of killing Douglas, at the trial he admitted firing the fatal shot. His evidence sought to mitigate the shooting by testifying about his reasons for believing that Douglas was cheating him and to present a self-defense theory by claiming that Douglas reached for his own gun before he (Robert Wood) fired.

The state's problems in relation to the three present petitioners were considerably greater. None of them took the stand. Eyewitness Thomas could not identify any of them. Robert Wood, who had originally denied that he killed Douglas, admitted at trial that he had killed Douglas. He also testified that Hamilton (whom he had known as an employee of Joe Wood) was one of the three armed black men who entered the room *after* he (Robert Wood) had killed Douglas. He was unable to make a clear identification of petitioners Pickens and Randolph as the other two participants at the scene. The state's reliance, as a result, was primarily upon the admission of oral or written statements said by the Memphis police to have been furnished voluntarily by the three petitioners.

While each such statement was redacted to the extent of eliminating the other two petitioners' names, they were such as to leave no possible doubt in the jurors' minds concerning the "person[s]" referred to.

It should also be noted that at the original trial, motions to suppress the Randolph and Pickens statements were made on grounds of physical abuse and threats, but were denied by the state court trial judge after some rather vivid coercion com-

plaints. The District Judge found no federal constitutional abuse in the state trial judge's finding on this score and no issue concerning coercion is presented on this appeal.

The state trial judge also gave in each instance an instruction to the jury that the confession admitted could only be used against the defendant who gave it and not as evidence of guilt of the codefendants.

As indicated above, all five of the defendants in the state court trial were found guilty of first degree murder and sentenced to life imprisonment.

After their state court trial convictions and sentences, all five defendants appealed. The Tennessee Court of Appeals set the convictions aside on the ground that the *Bruton* rule, *Bruton v. United States*, 391 U.S. 123 (1968), had been violated by the admission of confessions by coconspirators who did not testify and were not subject to cross-examination, and because under Tennessee law, felony murder had not been made out in relation to these three parties who had not entered the room at the time of the shooting. The Tennessee Supreme Court, however, reversed on both of these issues. It construed Tennessee felony murder law broadly enough to include these three petitioners because they were parties to a prior robbery plan. The court also held that each defendant's own statement "interlocked with" and corroborated the other statements of the other two defendants. In these contentions it found justification for the admission of all three confessions as to petitioners, citing *Harrington v. California*, 395 U.S. 250 (1969) and *Schneble v. Florida*, 405 U.S. 427 (1972), and some Tennessee case law (*see O'Neil v. State*, 2 Tenn. Crim. App. 518, 455 S.W. 2d 597 (1970)).

It should be noted that no court which has dealt with these three petitioners' *Bruton* contentions has sought to treat the admission of the three confessions as harmless error.

The Bruton Issue

In *Bruton v. United States, supra,* the United States Supreme Court set forth the rule of law which we believe governs this case. The Court's opinion said:

> [A]s was recognized in *Jackson v. Denno, supra,* there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt v. Utah, supra; Throckmorton v. Holt,* 180 U.S. 552, 567; *Mora v. United States,* 190 F. 2d 749; *Holt v. United States,* 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer v. Texas, supra.* * * * It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U.S., at 389. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witness against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See *Anderson v. United States,* 318 U.S. 350, 356-357; cf. *Burgett v. Texas,* 389 U.S. 109, 115. *Reversed.*
>
> *Reversed.*

Bruton v. United States, supra at 135-37 (footnotes omitted).

We find no instance where the rule just stated has been overruled or altered in subsequent Supreme Court opinions.

In the case presently before us, the *Bruton* rule of exclusion would therefore apply to all police evidence concerning the confessions (written or oral) said to have been given by the three present petitioners. No one of the petitioners took the stand or was available for cross-examination by his codefendants. As to each defendant, testimony concerning the two other confessions was purely hearsay and was admitted without any possibility of in-court confrontation.

We find no language in the *Harrington* or *Schneble* cases relied upon by the state which holds testimony concerning the confessions of joint defendants to be admissible under such circumstances with or without judicial admonitions to the jury.

As we read the Supreme Court opinions in *Harrington* and *Schneble,* the sole issue pertained to whether or not (assuming the codefendants' confessions had been admitted in violation of *Bruton's* interpretation of the confrontation clause) there were nonetheless admissible proofs of such force as to make the constitutional error "harmless beyond reasonable

doubt." *See Chapman v. California*, 386 U.S. 18 (1967). In *Harrington* the Court's opinion described such proofs as "so overwhelming that unless we say no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed." *Harrington v. California, supra* at 254. And the Court, in addition to other admissible evidence indicating guilt, noted specifically that a codefendant who testified and was cross-examined had placed Harrington in the store with a gun when the murder was committed. The clearly admissible facts in *Schneble* were equally clearly probative of participation in the murder there involved.

This court has sought faithfully to follow the teachings of *Bruton, Harrington* and *Schneble. See Glinsey v. Parker*, 491 F.2d 337 (6th Cir.), *cert. denied*, 417 U.S. 921 (1974); *United States v. Brown*, 452 F.2d 868 (6th Cir. 1971), *aff'd*, 411 U.S. 223 (1973), and *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978). In the last two cases we found *Bruton* violations, but our analysis of the clearly admissible evidence showed it to be so strong as to make the *Bruton* error harmless beyond reasonable doubt.

We recognize that the majority opinions in both *Harrington* and *Schneble* accepted the defendant's own confession as part of the evidence to be weighed as admissible in determining whether the violation of the *Bruton* rule was or was not harmless error. Since all three of these confessions were inadmissible at this joint trial, we find this holding conceptually difficult in this case. Nonetheless, we accept at face value each of the defendants' confessions in this case as it might apply in a single trial against him. So considered in each case, we find such evidence, plus the testimony of Robert Wood, sufficient to support, but certainly not so overwhelming as to compel the jury verdict of guilty of first degree murder. As indicated below, there might be reasons to reach a different conclusion as to

these defendants if they were contesting a jury verdict of armed robbery rather than first degree murder.

In evaluating the question of harmless error in this case, it is important to point out the factors which might affect a jury's verdict in relation to these three defendants in separate trials where the *Bruton* rule was observed:

1) Randolph, Pickens and Hamilton were not involved in the gambling game between Douglas, the Las Vegas gambler, and Robert Wood, the hometown gambler who got cheated.

2) They were not involved in originating the plan for recouping Robert Wood's losses.

3) They were not in the room (and had not been) when Robert Wood killed Douglas.

4) Indeed, the jury could conclude from the admissible evidence in this case that when Joe Wood pulled out his pistol, the original plan for three "unknown" blacks to rob the all-white poker game was aborted and that petitioners' subsequent entry into the room did not involve them in the crime of murder.

Additionally, if we return to consideration of the joint trial, that jury as charged by the state court judge had the responsibility of determining whether or not any of the three confessions testified to by Memphis police was voluntarily given. Assuming that two of the three confessions had been removed from jury consciousness by adherence to *Bruton*, we find it impossible to conclude that the jury finding and ultimate verdict would, "beyond reasonable doubt," have been the same.

These factors serve to distinguish this case from *Harrington v. California, supra*, and *Schneble v. Florida, supra*, and to convince us that the *Bruton* errors found by the District Judge cannot (as he also held) be determined to be harmless beyond reasonable doubt.

We are fully aware that our rejection of the "interlocking" confession theory underscores a conflict between the holding of the Sixth Circuit in *Glinsey v. Parker, supra, United States v. Brown, supra,* and *Hodges v. Rose, supra,* and the views of the Second Circuit, as exemplified by *United States ex rel. Catanzaro v. Mancusi,* 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied,* 397 U.S. 942 (1970); *United States ex rel. Ortiz v. Fritz,* 476 F.2d 37, 39-40 (2d Cir.), *cert. denied,* 414 U.S. 1075 (1973), and *United States ex rel. Stanbridge v. Zelker,* 514 F.2d 45, 48-50 (2d Cir.), *cert. denied,* 423 U.S. 872 (1975).

The Second Circuit rationale is set out in the first of these cases as follows:

> Catanzaro's final claim is that the failure of the trial court to grant his motion for a separate trial prejudiced his right to a fair trial. He relies on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and United States ex rel. Hill v. Deegan, supra, [268 F. Supp. 580 (S.D.N.Y. (1967)] and argues that because the confession of the codefendant McChesney was introduced at the joint trial the writ of habeas corpus should be granted here.
>
> The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a codefendant who did. In our case Catanzaro himself confessed and his confession interlocks with and supports the confession of McChesney.
>
> Where the jury has heard not only a codefendant's confession but the defendant's own confession no such "devastating" risk attends the lack of confrontation as was thought to be involved in *Bruton*. See 391 U.S. at 136, 88 S.Ct. 1620.

> *United States ex rel. Catanzaro v. Mancusi, supra* at 300.

Catanzaro was decided on the heels of *Bruton v. United States, supra.* As noted above, there has been much debate on differing facts, as to whether a violation of the *Bruton* rule should or should not be held to be harmless error beyond reasonable doubt. But in no instance has the Supreme Court overruled *Bruton* or suggested that either identity or greater or lesser similarity of confessions presented by hearsay and without confrontation served to make them admissible. *See Harrington v. California, supra,* and *Schneble v. Florida, supra.* We believe that *Bruton v. United States* is controlling law. We also believe that there is a great difference between holding that hearsay and unconfronted confessions are admissible as to others than the confessor in joint trials, and holding that such confessions are inadmissible and, where admitted in error, must result in new trials unless the court can say that the constitutional error was harmless beyond reasonable doubt. *But see Metropolis v. Turner,* 437 F.2d 207, 208-09 (10th Cir. 1971) and *United States v. Walton,* 538 F.2d 1348, 1353-54 (8th Cir.), *cert. denied,* 429 U.S. 1024 (1976).

While there are conflicting Circuit Court opinions[3] which are both supportive of and contrary to the views expressed above on the *Bruton* violation and harmless error issues, this court's view was stated earlier in an opinion by our then colleague

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[3] 1. Cases Rejecting "Interlocking" Confession Admissibility:

a. Expressly:

Hodges v. Rose, — U.S. — (6th Cir. 1978) (Nos. 77-1374-75, slip. op. at 6); *United States v. DiGilio,* 538 F.2d 972, 981-83 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977).

b. Impliedly:

Hall v. Wolff, 539 F.2d 1146, 1148-49 (8th Cir. 1976); *Glinsey v. Parker,* 491 F.2d 337, 340-44 (6th Cir.), *cert. denied,* 417 U.S. 921 (1974); *United States v. Brown,* 452 F.2d 868 (6th Cir. 1971), *aff'd,* 411 U.S. 223 (1973); *Ignacio v. Guam,* 413 F.2d 513, 515-16 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970); *United States*

Judge Wade McCree. *See United States v. Brown*, 452 F.2d 868 (6th Cir. 1971), *aff'd*, 411 U.S. 223 (1973).

What we have written upon the *Bruton* issue requires our affirmance of issuance of the writs of habeas corpus. We therefore feel no need to write upon the second issue concerning the District Judge's finding that Pickens' right to counsel had been violated beyond noting that we have reviewed and we affirm his findings of fact and conclusions of law on this issue also.

The judgment of the District Court is affirmed.

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ex rel. Johnson v. Yeager, 399 F.2d 508, 510-11 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969).

2. Cases Adopting "Interlocking" Confession Admissibility:

United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970); *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45, 48-50 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975); *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

3. Cases Relying Upon Both "Harmless Error" and "Interlocking" Confession Admissibility (or Saying That the Choice of Doctrine Made No Difference):

United States v. Walton, 538 F.2d 1348, 1353-54 (8th Cir.), *cret. denied*, 429 U.S. 1025 (1976); *Mack v. Maggio*, 538 F.2d 1129, 1130 (5th Cir. 1976); *United States v. Spinks*, 470 F.2d 64, 65-66 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972); *Metropolis v. Turner*, 437 F.2d 207, 208-09 (10th Cir. 1971); *United States ex rel. Dukes v. Wallack*, 414 F.2d 246, 247 (2d Cir. 1969).

4. In *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37, 38-40 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973), a panel of the Second Circuit questioned the "interlocking" confession doctrine but felt bound to follow it by *United States ex rel. Catanzaro v. Mancusi*, *supra*.

APPENDIX B

In the United States District Court
For the Western District of Tennessee
Western Division

James Randolph,
Petitioner,
v. Civil C-76-68

Chief Harry Parker,
Respondent.

Wilburn Pickens,
Petitioner,
v. Civil C-76-69

Chief Harry Parker,
Respondent.

Isaiah Hamilton,
Petitioner,
v. Civil C-76-310

Chief Harry Parker,
Respondent.

Memorandum Decision

(Filed May 2, 1977)

Petitioners, Hamilton, Randolph and Pickens, were convicted in early 1972 in the Criminal Court of Shelby County of the offense of felony-murder, in this case a homicide in the perpetration of an armed robbery, and they received life sentences.

The state's factual theory, in a nutshell, can be stated as follows: In July, 1970, Robert Woods had lost a considerable

amount of money in head-to-head card games with one Douglas and had become convinced that Douglas had been cheating him. In anticipation of still another game, Robert asked his brother, Joe Woods, to arrange to "have the game robbed," and in this way regain most, if not all, of what he had lost. Joe Woods then enlisted petitioner Hamilton, an employee of his, who associated petitioners Randolph and Pickens, to carry out this venture. While the card game was in progress, petitioners, by pre-arrangement, were waiting in the vicinity of the apartment where it was being held. Joe Woods and one Tommy Thomas were in the apartment watching the game. Joe left the apartment and brought petitioners back with him, but failed to gain entrance for them when Douglas, hearing strange noises in the hallway, refused to allow the door to be opened. However, later, after petitioners had returned to their place of waiting, Joe did obtain admission for himself into the apartment. Shortly thereafter, Joe pulled a pistol on Douglas and Thomas, and then, handing the pistol to Robert Woods, went to tell petitioners to move in on the game. (Obviously, matters were not going according to plan.) Before petitioners reached the apartment, however, Douglas went for his pistol with the result that Robert Woods shot and killed him. Within seconds after the shooting, Joe and the petitioners knocked the apartment door down and entered, Robert then took all of the cash, and later petitioners Hamilton and Randolph (but not petitioner Pickens) were paid $50.00 for their participation.

The commission of a homicide during the commission of a felony was murder at common law, and under Tennessee criminal statutes (TCA § 39-2402) such is murder in the first degree.

The Tennessee Court of Criminal Appeals reversed the convictions, holding that, since the shooting of Douglas had occurred before petitioners had reached the scene, they could not be guilty of felony-murder. The Supreme Court of Tennessee, however, granted certiorari, reversed the Court of Criminal Appeals, and reinstated the convictions. It held that the shooting of Douglas was within the res gestae of the robbery in which petitioners were taking part.

Thereafter, petitioners filed the instant habeas petitions, which have been before the magistrate for a report and recommendation. With the exception of two of the claims raised by petitioners, the magistrate concluded, with which we have concurred, that the claims of petitioners have been foreclosed by the determinations made in the state courts or that petitioners have not exhausted state remedies with respect to such claims. In particular, the magistrate concluded (and we have agreed) that the application of the felony-murder rule under these facts did not constitute a denial of federal due process.

The issues that we have before us, then, are the following:

1. Was petitioner Pickens deprived of a *Miranda* right when his confession was taken after, he contends, he has asked that his lawyer be present.

2. Were all three petitioners denied their right to confrontation and cross-examination under the *Bruton* decision when their confessions were read to the jury and none of them testified.

I

With respect to petitioner Pickens' *Miranda* claim, it should be pointed out that his claim in this general area is actually broader than that he was denied access to counsel. Indeed, he claims that the arresting officers threatened him with physical harm on two occasions while he was being brought to the police station and that he was threatened with such harm again while there before he signed a statement. Pickens also claims that, because the police had taken his glasses, he could not read and did not know what he was signing and that the facts in the statement were supplied by the police. Thus Pickens claims

that the signed statement was not a free and voluntary one and, indeed, that it was not his statement at all.

At the conclusion of the hearing on the admissibility of Pickens' confession, during which evidence had been introduced out of the presence of the jury on all of these matters, the state trial court overruled the motion to suppress on all grounds without elaborating. This court has concluded that, with respect to all of Pickens' contentions except that based on denial of access to counsel, the record supports the conclusion of the state trial court under the standards set out in 28 USCA § 2254 (d) and that this court therefore cannot review such determinations. Our conclusion, however, is to the contrary with respect to the claim of denial of access to counsel.

The facts surrounding Pickens' contact with his lawyer on the day before his arrest were undisputed in the state trial court and are undisputed here. On the day prior to his arrest, Pickens' picture appeared in a local newspaper, along with others, with a story saying that they were wanted for the Douglas murder. Pickens saw his picture and called a local lawyer, who already represented him in another matter, in the early evening and asked the lawyer to accompany him to the police station to turn himself in. The lawyer Anthony Sabella, had already seen the picture and story. Sabella advised Pickens that he could not go with him that evening and asked Pickens to come to his office the next morning and he would surrender Pickens to the police. Sabella also told Pickens that if, in the meantime, he were arrested, he must advise the police that Sabella was his lawyer and that he wanted his lawyer present for any questioning. Pickens was arrested in the very early hours of the next morning.

Pickens testified in the state court and here that he told the police more than once that Sabella was his lawyer and wanted to contact him and that the police denied him the opportunity.

The police testified in state court that Pickens never asked for a lawyer or mentioned Sabella.

It seems practically inconceivable to this court that Pickens, who had been in contact with his lawyer the evening before and had been instructed by his lawyer to tell the police that he wanted his lawyer present if he were arrested during the night, would not have mentioned this to the police, when they arrested him a few hours later and had him in custody. The police, it is true, testified that Pickens did not ask for or even mention that he had counsel, but the police were testifying about, to them, a routine event eighteen months after the event. We are satisfied, therefore, that this record does not support the finding that Pickens did not ask for access to his lawyer and on the contrary that the evidence is convincing that he did ask for access to his lawyer. 28 USCA § 2254(d).

We, therefore, conclude that the admission in evidence of Pickens' confession was constitutional error in that it violated his right as set out in *Miranda*.

II

As stated, each of the three petitioners contends that his right to confrontation and cross-examination, as such is set out in *Bruton*, was violated when the confessions of the other petitioners were admitted in evidence and neither of them took the stand and testified, although the trial court did charge the jury that each confession could be considered as evidence only against the defendant making the confession.

At the state trial, an effort was made so to redact the statements so that the identity of persons other than the declarant and persons not on trial could not be ascertained by the jury. This effort, however, was unsuccessful and respondent does not contend to the contrary.

The Supreme Court of Tennessee considered the *Bruton* problem and concluded that there was no constitutional error. Each of the confessions was consistent with the others so that they could be said to be interlocking confessions. It is not clear whether the Tennessee court considered that there was no such error because, under these circumstances, *Bruton* simply does not apply or because, under these circumstances, the violation of *Bruton* was harmless error.

In any case, respondent, relying on such cases as *Stanbridge v. Zelker*, 514 F.2d 45 (2nd Cir. 1975), holding that there was no *Bruton* violation because there were interlocking confessions, contends that the same result should be reached here so far as the *Bruton* case is concerned. In *Glinsey v. Parker*, 491 F.2d 337 (6th Cir. 1974), however, our Court of Appeals held that *Bruton* applied where there were interlocking confessions. We therefore conclude that, as of now, the rule in this circuit is different from that in the Second Circuit.

Respondent alternatively contends that, even if *Bruton* applies and was violated, such was harmless error beyond a reasonable doubt. This contention raises the question whether the confessions of petitioners Hamilton and Randolph, the admission of which this court has held not to have been constitutional error, could themselves be the basis of a finding that the *Bruton* violation was harmless. Again, in *Glinsey, supra*, at 343-344, our Court of Appeals seems to hold that the proper admission of a confession does not cure the *Bruton* problem as to the confessor. Moreover, other than the confessions of these petitioners, the only other evidence of their guilt is the testimony of Robert Woods whose identification of petitioners Randolph and Pickens was very weak. Still further, there was no proof, except in the confessions, that petitioners had been, though Joe Woods, a part of a pre-arranged robbery plan, a necessary ingredient to their conviction of felony—murder; Robert Woods supplied no such proof in his testimony.

Accordingly, we conclude that the right of these petitioners to confrontation and cross-examination was violated under *Bruton* and we cannot find that the violation of the *Bruton* principle was harmless error beyond a reasonable doubt.

Order for Judgment

It is therefore ORDERED that the Clerk will enter a final judgment providing that petitioners will be discharged from custody unless (1) the State of Tennessee retries them within a reasonable time or (2) respondent timely appeals this decision in which case the discharge of petitioners will be stayed pending appeal.

ENTER this 2 day of May, 1977.

/s/ (Illegible)
Chief Judge

APPENDIX C

In the Supreme Court of Tennessee
at Jackson

December 15, 1975

State of Tennessee,
Petitioner,

vs.

Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilbur Lee Pickens,
Respondents.

Shelby Criminal
Honorable
Perry H. Sellers,
Judge

FOR PETITIONER:

David M. Pack
Attorney General
Nashville, Tennessee

Robert H. Roberts
Assistant Attorney General
Nashville, Tennessee

Joe Patterson
Don D. Strother
Assistant District Attorneys General
Memphis, Tennessee

FOR RESPONDENTS:

Hugh Stanton, Jr.
Memphis, Tennessee

H. H. McKnight
Memphis, Tennessee

Robert L. Smith
Memphis, Tennessee

Charles J. Cassell
Memphis, Tennessee

Anthony J. Sabella
Memphis, Tennessee

Opinion

(Filed December 15, 1975)

REVERSED PER CURIAM

This case presents two principal issues, viz: (1) whether the facts justify an application of the "felony-murder" rule, and (2) whether the admissibility of certain confessions of the co-defendants constitute a violation of the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The five defendants were convicted of murder in the perpetration of robbery and were sentenced to life imprisonment. The Court of Criminal Appeals reversed and remanded for a new trial.

I

The record reveals the following crucial facts surrounding this homicide.

Approximately three weeks prior to the night of the incident at issue, July 6, 1970, a poker game was arranged by one Walter Lee (Woppy) Gaddy between respondent, Robert Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional gambler from Las Vegas had agreed to give Gaddy a cut of his winnings in exchange for the use of his apartment, and his effort at setting up Robert Wood. Wood arrived for this first game, anticipating the presence of several participants, yet only he and the deceased, as planned, showed up. The final result of this initial encounter was that Wood lost "twenty-some hundred dollars."

A similar pattern was followed for the second meeting one week later. This game also produced a similar result. Wood losing another fifteen hundred ($1,500) to two thousand ($2,000) dollars.

For the scheduled third meeting of July 3, 1970, Wood, his suspicions of being cheated[1] having increased with each game,

[1] The record reflects that Douglas was playing with a marked deck. He was utilizing a wax substance on a deck of paper cards which was discernible to the trained eye.

decided to bring along an acquaintance, Tommy Thomas, who had the reputation of being a "pretty good poker player." However, the fathers of Thomas and Douglas had been close friends, and Thomas was also persuaded to fix the game by losing some one thousand ($1,000) dollars, six hundred ($600) dollars of which had been put up by Wood.

The fourth meeting between Douglas and Wood was set for July 6, 1970, again at Gaddy's apartment. Wood, convinced he was being cheated, asked his brother, Joe E. Wood, to come along. The extent of Robert Wood's plan to retrieve the four thousand five hundred ($4,500) dollars he had lost is best demonstrated by his own testimony:

Q. Now, was your brother in any of these other games?

A. No, sir.

Q. How did he happen to come this time?

A. I had told him that I would probably need some money and I told him I suspected the man was cheating.

Q. Did you say anything to him about getting some help?

A. I told him that several people there and they had guns and so forth. I told him I suspected the man was cheating me. If I caught him cheating me, I was going to ask for my money back and I might need some help to get it back.

* * * * * * * *

Q. And, you mentioned to him that you thought you were being cheated, is that correct?

A. Yes, Sir.

Q. And, what else did you tell him?

A. I told him that I, we was getting plastic cards.

Q. That you were getting plastic cards?

A. To play with and I was going to see if I could catch him cheating in any way.

Q. And, did you tell him that there were men out there with guns if I understood you right?

A. I said the man had some guns there.

Q. Did you say anything to him about getting some help?

A. He said that he would bring somebody with him. I didn't know exactly who or how many.

Q. Said he would bring somebody with him?

A. That worked for him.

* * * * * * * *

Q. Now, they were—you understood that he was to bring some people with him that worked for him, is that correct?

A. Yes, sir.

Q. What were they coming there for?

A. If I caught the man cheating, I was going to demand my money back and I did not figure he would be willing to give it up that easily.

Q. So you could say that they were coming there to rob this man, is that correct?

A. Well, if you would call it that, I would call it if you had been cheated out of your money, you just got your money back, it wouldn't be considered as robbing somebody.

Robert's brother, Joe, responding to this plea for assistance, contacted two of the other respondents, Isaiah Hamilton and Wilbur Pickens, enlisting them in this scheme. Joe Wood, on July 4, 1970, took them to the Benbow Apartments (where the game was to be held), pointing out the particular apart-

ment, and he promised them three hundred ($300) to four hundred ($400) dollars to rob the game explaining to them that his brother was being cheated. He also told them that he would be inside the apartment and would "kill him (Douglas) if I have to."

On the night of July 6, Joe Wood enlisted a third companion, James Randolph. Randolph, having been informed of the situation with the same brief yet decisive language used by Joe Wood with Hamilton and Pickens, joined these two and the trio headed for the Benbow Apartments.

At Gaddy's apartment the scene was as follows: Robert Wood and Douglas began playing poker around 7:30 p.m. Joe Wood and Tommy Thomas (who had come at the invitation of Douglas) sat in the same room as spectators. Between 8:30 p.m. and 9:00 p.m. Joe Wood announced he was going to get some more beer. He asked Thomas to accompany him, but Thomas elected to remain. While supposedly out getting beer, Joe Wood met with his three enlisted companions.

After a brief trip to the nearby Krystal Restaurant, a purchase of some beer, and a positioning of the automobiles, the four approached the apartment. As they neared the apartment, Thomas heard the sounds of several people. He placed himself near the door. Douglas, fearing a break-in, ran to the bedroom, returning with a shotgun. He stood in front of the door armed with the shotgun and a pistol which he pulled from his belt. After repeated inquiries by Thomas as to who it was, during which Joe Wood's three companions returned to their car, Joe Wood convinced him he was alone. Yet, as a precautionary measure, Douglas made Joe Wood crawl through a small window next to the front door. During all this Douglas remained armed with two weapons, pointed at the incoming Wood.

Once Joe Wood was in the room, Douglas was convinced the situation had returned to normal, and announced his intention to resume the game (approximately eighteen hundred ($1,800) dollars was on the table at this time). At this point, Robert Wood expressed his desire to quit and leave but Douglas still armed with two weapons, would not so agree, and he stated that the game would continue until the money on the table was completely won or lost. Reluctantly Robert Wood sat down.

The game having been resumed for only five to ten minutes, Joe Wood arose, and asked permission to go into the bathroom. He exited the bathroom armed with a derringer, and walked behind Douglas, ordering Thomas and him to lie on the floor. Thomas quickly responded, but Douglas remained sitting. Joe Wood then handed the derringer to his brother, who remained stunned at these totally unexpected actions (Robert Wood testified he did not even know his brother was armed, especially since he was fiercely quizzed by Douglas as he crawled in through the window). Joe then darted out the door, leaving it open.

At this point, Thomas in an effort to avoid any shooting, rose from the floor, telling Robert Wood "that they had to talk this thing out", and went to front door, where he closed and locked it. As he was returning toward the poker table, Douglas made a move for the pistol in his belt, and Robert Wood "spun around and snapped one shot" into Douglas' chest.

Within seconds after the shooting, the three armed men kicked in the door and one of them fired a shot at Robert Wood because he was armed, the bullet landing in the wall above his head. (The record demonstrates that after Joe Wood exited the apartment, he called to his three companions who came running from their nearby car). One of the three searched Thomas, taking from him a knife and eighty ($80) dollars. Robert Wood then took all the money on the table (some two thousand ($2,000) to two thousand five hundred ($2,500) dollars) and stuffed it in his pockets. Everyone then exited with the exception of Thomas who remained behind to attend to Douglas.

Four of the five respondents then met at the apartment of Isaiah Hamilton, where the weapons were hidden, and Hamilton and Randolph were given fifty ($50) dollars apiece. Pickens, who had left the car prior to arriving at Hamilton's apartment, received no money.

Subsequent to the incident, all five respondents were either arrested or surrendered themselves to Memphis police. Statements were taken from all except Joe Wood. At the trial only Robert Wood took the witness stand. The statements of Hamilton, Pickens, Randolph and Robert Wood, all being found by the trial judge to have been freely and voluntarily given, were admitted into evidence through the testimony of several officers of the Memphis Police Department.

In an effort to comply with the rule enunciated in *Bruton v. United States, supra,* the trial court and all counsel diligently attempted a program of redaction for each of the total four statements. These efforts are revealed through several entire volumes of the bill of exceptions. In short, any reference by one defendant as to another defendant was replaced with "blank" or "another person." The Court of Criminal Appeals, in its majority opinion found this particular type of redaction to be inappropriate and not in full compliance with the *Bruton* rule.

In summarized form, as to the crucial facts, the evidence reveals:

> (1) that Tommy Thomas witnessed the felonious actions of Joe Wood, Randolph, Pickens and Hamilton, and he saw Robert Wood actually shoot William Douglas;
>
> (2) that Robert Wood took approximately two thousand ($2,000) dollars from the poker table;
>
> (3) that the actual physical shooting preceded the ultimate robbery by only a few seconds;

> (4) that Robert Wood fired upon Douglas after the latter reached for a pistol in his belt.
>
> (5) that all the respondents were operating under a scheme of some proportions to retrieve the money lost by Robert Wood to William Douglas.

Based upon these presented facts, all five (5) defendants were convicted of murder in the perpetration of a robbery, § 39-2402 T.C.A. On appeal the Court of Criminal Appeals in a split decision reversed and ruled:

> There is nothing to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confession of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.
>
> [Court of Criminal Appeals opinion, p. 3, Judge Mitchell dissented as to this ruling, stating that the facts clearly demonstrated an overall robbery plan, and that the jury's finding of guilt is not overcome by a preponderance of the evidence, citing *State v. Grace*, 493 S.W.2d 474 (1973)].

II

We cannot concur with the majority's assessment of evidence on the issue of felony-murder.

In his multi-volume work on criminal law and procedure, Wharton defines the felony-murder rule at §251 as follows:

> A murder committed in the course of the perpetration of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of a felony, even though the killing is unintentional and accidental.
>
> *Wharton's Criminal Law and Procedure* Vol. 1 (1957).

This concept of implied or imputed malice was statutorily recognized in Tennessee in 1829 with chapter 23 of the Public Acts of that year which ultmately produced §39-2402 T.C.A. This statute now reads in pertinent part:

> 39-2402. *Murder in the first degree.*—An individual commits murder in the first degree if:
>
> * * * * * * *
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, *robbery*, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. (Emphasis supplied)

In applying §39-2402 T.C.A. the courts of this State have consistently held that killing is murder in the first degree, regardless of whether malice and premeditation are proven, where such is done in the commission of a robbery. *Phillips v. State*, 2 Tenn.Crim.App. 609, 455 S.W.2d 637 (1970). *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932).

Additional cases offer more definitive treatment of the felony-murder rule. Quoting from *Wharton on Homicide*, this Court in the case of *Smith v. State*, 209 Tenn. 499, 354 S.W.2d 450 (1961) pronounced:

> Where a person is killed by another in perpetrating, or attempting to perpetrate, a felony or criminal act calculated to cause death, the premeditated intent to commit a felony or other criminal act is, by implication of law, transferred from that offense to the homicide actually committed, so as to make the latter offense a killing with malice aforethought constituting murder in the first degree. In such case the turpitude of the criminal act supplies the place of deliberate and premeditated malice and is its legal equivalent and the purpose to kill is conclusively presumed from the intention which is of the essence of the criminal act intended. And such a murder is a murder in the first degree under such statutes, though it is casual and unintentional.
>
> 354 S.W.2d at 450, 451

The killing must have been done in pursuance of the unlawful act, and not collateral to it: it must have an intimate relation and close connection with the felony and not be separate, distinct and independent from it. *Farmer v. State*, 201 Tenn. 107, 296 S.W.2d 879 (1956). For the felony-murder to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony. *Wharton*, § 252, *supra*.

However, it is not necessary that the defendants believe that death would result. As pronounced by Justice Felts, when speaking for this Court in *Dupes v. State*, 209 Tenn. 506, 354 S.W.2d 453 (1962):

> A murder committed in the perpetration of or attempt to perpetrate, 'robbery', is murder in the first degree. (T.C.A. § 39-2402).
>
> When they thus entered upon a common design to commit a felony, the natural and probable consequences of

> which involved the contingency of taking human life,[2] all were res, nsible for the acts of each committed in furtherance of such design even though the killing was not specifically contemplated. (citations omitted)
>
> 354 S.W.2d at 456

Although the cumulative import of the evidence as recited above is that no physical harm was planned as to the deceased, each and every defendant either through words or actions demonstrated his knowledge that "killing may be necessary." Each foresaw the probable consequence of homicide.

The majority opinion by the Court of Criminal Appeals seemed to view the timing of the events as the crucial factor in their conclusion of the non-application of the felony-murder doctrine. The fact that the shooting was prior to the actual taking of money from the apartment was controlling in their minds. We feel that this limited "timing" analysis is an oversimplification of the felony-murder rule, and is contrary to the law in this State.

In *Smith v. State, supra*, this court applied the concept of "res gestae" to the issue of felony murder. In that case the defendant argued that the killing which occurred prior to the actual taking of any money, was not done in pursuance of the robbery, but collateral to it. The facts of the case were that the defendant upon entering a liquor store informed the proprietor, who was positioned behind the counter, of his intentions of robbery. When refused money, defendant drew a pistol. The proprietor also drew a gun and attempted to fire it at the intruder, to which the defendant retaliated with a deadly shot to the chest of the store owner. This Court, in rejecting

[2] Historically, the felony-murder doctrine applies only to felonies that are inherently or foreseeably dangerous to human life, of which robbery is unanimously included. See Annotation, Felony Murder—"Dangerous" Felonies, 50 A.L.R.3d 397.

defendant's argument that the homicide was collateral to the robbery, stated:

> We think that unquestionably this killing was done and is part of the *res gestae* of the whole acts embracing the robbery. It had a close and intimate connection with the felony and grew out of the attempt to commit the felony.
>
> 354 S.W.2d at 452.

(This application of "res gestae"[3] to cases of felony-murder has been recognized in eighteen (18) additional jurisdictions. See Annotation, Felony Murder Rule—"Termination of Felony" 58 A.L.R.3d 851).

The felony-murder rule applies when the killing occurs during the commission of or the *attempt to commit* the felony. *Wharton* §251, *supra; Smith v. State, supra.* The evidence demonstrates that each defendant was carrying out or attempting to carry out a scheme of robbery. During the attempt to activate this plan, the deceased was shot and subsequently died; a natural and foreseeable consequence of activity which endangers human life. By the agreement between the defendants to pursue the illegal action of a robbery, the act of one coconspirator (Robert Wood) in pursuance of that purpose was an act for which criminal liability attached to each defendant. *Williams v. State*, 164 Tenn. 562, 51 S.W.2d 482 (1932); *Dupes v. State, supra*, and *Wharton* §251, *supra.*

There remains one tangential issue, derivative of the felony-murder rule in this case. Defendant Robert Wood claims that

[3] There are numerous decisions from multiple jurisdictions which apply the felony-murder doctrine to homicides which occur after the actual commission of the felony, eg. during the escape. The separation of time and/or place between the felony and the homicide is usually answered by ruling that the delayed homicide was part of the res gestae or in pursuance of the felony. (See 58 A.L.R.3d 851, *infra*, at section 6.) This case presents the inverse situation wherein the homicide precedes the actual commission of the felony. However, the application of the principle of res gestae is equally appropriate.

he shot the deceased only after he reached for a gun in his belt. The testimony of Tommy Thomas corroborates this version of the homicide. However, this implied formulation of a self-defense theme is inappropriate in a felony-murder case.

This Court answered this particular proposition in *Smith v. State, supra,* holding that a robber could not claim self-defense in a prosecution for first degree murder committed during such robbery, because:

> Under such circumstances when one brings on the act by approaching another with a gun and demands money, he is not, should not, and cannot be in a position to say, 'Well, I killed him because I thought he was going to shoot me.' He is the instigator and author and brings about the whole chain reaction, and thus cannot defend on this ground.
>
> 354 S.W.2d at 452

III

The latter, and equally difficult issue of this case is a consideration of the admission of certain evidence in light of the holding in *Bruton v. United States, supra.*

As noted previously, each of the statements given to Memphis police authorities by Robert Wood, Randolph, Pickens and Hamilton, were admitted through the testimony of the interrogating officer. And, as cited, each went through a laborious process of redaction, whereby references by the confessing defendant as to the other defendants were replaced with "blank" or "another person."

It should be stressed that Robert Wood's inculpatory testimony (in direct variance to his confession wherein he stated that Randolph, Pickens and Hamilton shot Douglas and robbed

the game) went way beyond the replaced references to him within the statements of Randolph, Pickens and Hamilton, for none of them actually witnessed the shooting. And, in addition, the record reveals that the confessions of these three were strikingly similar in content, both in their original and redacted versions.

In the *Bruton* case, two co-defendants, Evans and Bruton, were jointly tried on a federal charge of armed postal robbery. Although Evans did not testify, a prior oral confession by Evans, implicating both Bruton and him, was admitted through the testimony of a postal inspector. The trial court instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against Bruton and must be disregarded in determining the guilt or innocence of Bruton. In light of the trial court's limiting instructions, Bruton's conviction was affirmed by the Eighth Circuit Court of Appeals. On certiorari. the United States Supreme Court reversed as to Bruton's conviction.

The full import of this decision can best be demonstrated through several extracted portions of the opinion, which will follow a brief examination of the evolution of the *Bruton* rule.

The *Bruton* case presented the identical question considered by the United States Supreme Court in *Delli Paoli v. United States,* 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), i.e., whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a co-defendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence. In a 5-4 opinion the Court ruled that under appropriate instructions to the jury protecting the implicated defendants, the admission of such a confession was not reversible error. The basic premise upon which the *Delli Paoli* decision rested was the belief that it was fair to proceed under the assumption that the jury

was capable of following the judge's repeated admonitions concerning the utility of the confession. 352 U.S. 239.

Between the *Delli Paoli* and *Bruton* decisions, the United States Supreme Court confronted an analogous situation in *Douglas v. State of Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). In that case, a mutually inculpatory confession by one defendant was admitted into evidence at the separate trial of a co-defendant. The defendant at the latter trial was denied the opportunity to cross-examine his accuser because he had exercised his Fifth Amendment privilege. The Court reversed the conviction, ruling that such a procedure denied the defendant "the right of cross-examination secured by the Confrontation Clause," 380 U.S. 419 (relying upon *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923).

With this particular case law development in mind, the Court in *Bruton* reasoned:

> *Delli Paoli* assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence. But . . . that assumption has since been effectively repudiated.
>
> 391 U.S. at 128 (with reference to the *Pointer v. Texas, supra*, and *Douglas v. Alabama, supra*, decisions).

Adopting the language of Justice Frankfurter in his dissent in *Delli Paoli* as to the jury instructions the Court pronounced:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose of a legal protection to defendants against whom such a declaration should not tell."
>
> *Id.* at 129.

Recognizing the attack that its ruling would have upon the viability and vitality of the jury system, the Court pointed out:

> *Not every* admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that *in many* cases, the jury can and will follow the trial judge's instructions to disregard such information. (Emphasis supplied)
>
> *Id.* at 135.

Yet the Court concluded with explicit reaffirmance that a confession which inculpates a co-defendant, yet evades confrontation is inadmissible hearsay and, standing alone is reversible error. This firm conclusion is inescapable from a reading of the following pronouncements:

> Nevertheless . . . *there are some contexts* in which the risk that the jury *will not, or cannot*, follow instructions is so great, and the consequences of failure so vital to the defendant, *that the practical and human limitations of the jury system cannot be ignored.* (Emphasis supplied)
>
> *Id.* at 135.

* * * * * * *

Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. *The*

effect is the same as if there had been no instruction at all. (Emphasis supplied)

Id. at 137.

Following the *Bruton* decision, an exception to the application of this rule emerged through two particular decisions. Both *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) and *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) stand for the proposition that a violation of the Bruton rule in the course of a trial does not require reversal, if evidence of guilt is so overwhelming, that the prejudicial effect of the co-defendant's admission is so comparatively insignificant as to clearly be harmless error. (In each of these cases, the evidence of overwhelming guilt was in major portion, a product of the defendant's own confession.) This "overwhelming evidence" exception has been recognized by the courts of this State. *Taylor v. State*, 493 S.W.2d 477 (Tenn.Crim.App. 1972).

However, prior to this recognition of the exception pronounced in *Harrington v. California, supra,* the Tennessee Court of Criminal Appeals had carved out an additional judicial limitation to the application of the *Bruton* rule. In the opinion of *O'Neal v. State*, 2 Tenn.Crim.App. 518, 455 S.W.2d 597 (1970) the court, in applying the *Bruton* doctrine to a situation where all co-defendants made inculpatory, intertwining confessions, yet none testified, stated:

> In this record under these facts and circumstances, with Bruton v. United States, supra, in mind, to say this was error, i.e., violative of the confrontation clause of the Sixth Amendment, to allow these statements to be used in evidence we believe not.
>
> * * * * * * *

> We are of the opinion this is one of the contexts in which the jury under the facts and circumstances developed could obey and follow the instructions of the court as found in this record.
>
> 455 S.W.2d at 603

This pronouncement was relied upon as direct precedent in a subsequent case, *Briggs v. State*, 501 S.W.2d 831 (Tenn. Crim. App. 1973) for the legal proposition that the *Bruton* rule is inapplicable where all of the jointly tried co-defendants confess.[4] We reiterate the observation recently made by Justice Cooper while speaking for this Court in *State v. Elliott*, 524 S.W.2d 473 (Tenn. 1975):

> We think this statement is an over-simplification of the impact of the *Bruton* rule.
>
> 524 S.W.2d at 477

The facts of this case, when combined with the particular pattern of confessions and testimony by the various defendants, present a hybrid *Bruton-Schneble-O'Neil* problem.

The major criterion for the *Bruton* application is satisfied through the admissibility of confessions of the defendants, implicating their various co-defendants, without such co-defendants being afforded the opportunity of a cross-examination of their accusors.

Yet, the "overwhelming guilt" exception to *Bruton* announced in *Schneble v. Florida, supra,* also has direct application to defendants, Robert and Joe Wood. Robert's own testimony es-

---

[4] There is a clear division among the jurisdictions as to the proper *Bruton* analysis in a situation where two or more co-defendants make mutually inculpatory, interlocking confessions which are admitted at trial. Courts have ruled that such admission is: (1) erroneous; (2) erroneous but harmless error; and (3) not erroneous. See Annotation, Confrontation Clause—Bruton Rule, 29 L.Ed.2d 931, 981-989.

tablishes his guilt with greater specificity than do any of the three redacted confessions (either singly or cumulatively) of his co-defendants. (This is especially true since the confessing co-defendants had no visible knowledge of the actual homicide.) In addition, Robert's version of the homicide is corroborated in detail by the testimony of the eye-witness Tommy Thomas. Robert Wood's effort to plead self-defense is inappropriate, *Smith v. State, supra;* and his guilt is demonstrated through "overwhelming evidence", thus causing any possible *Bruton* violation to be harmless error. *Schneble v. Florida, supra.*

This "overwhelming guilt" analysis also has application to the guilt or innocence of defendant, Joe Wood. The testimony of both Robert Wood and Tommy Thomas (who were subject to cross-examination) reveal Joe Wood as the initial instigator of the actual felony-murder. In addition, independent evidence (through several State witnesses who were neighbors of Woppy Gaddy) places Joe Wood at the entrance to Gaddy's apartment prior to and immediately following the shooting. Also, the record reflects that the confessions of Hamilton, Pickens and Randolph were sufficiently "cleansed" of any direct references to Joe Wood. And he did not suffer under the potential burden of group identification as did the three enlisted participants. Even accepting that the cumulative import of the three confessions caused some prejudice to attach to Joe Wood, their admissibility was harmless error in light of the overwhelming evidence against him, *Schneble v. Florida, supra.* His guilt in the felony-murder was properly established.

Finally, the interlocking inculpatory confessions of Randolph, Pickens and Hamilton is a situation akin to that addressed in *O'Neal v. State, supra.* The confessions of Randolph, Pickens and Hamilton clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme. As pointed out by this Court in *State v. Elliott, supra:*

> The fact that jointly tried co-defendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects . . .
>
> 524 S.W.2d at 478

This observation is more clearly understood through a direct comparison of such a situation to the facts from which *Bruton* emerged. As noted previously, *Bruton* involved a situation where the co-defendant through a confession (and not testimony) implicated the defendant in contradiction and repudiation to the defendant's testimony. Unlike *Bruton,* and like *O'Neil,* this case includes a situation where three co-defendants confess with similar, intertwining versions of their own actions. The contradiction and repudiation found in *Bruton,* upon which the prejudicial deprivation of confrontation rests, is simply not present. See *United States ex rel. Dukes v. Wallack,* 414 F. 2d 246, (2nd Cir. 1969). Added to this, in the instant case, is the fact that Robert Wood through direct testimony identified Randolph, Pickens and Hamilton as the three other participants. The guilt of this trio was presented to the jury without any prejudice attaching under a *Bruton* analysis. A defendant is entitled to a fair trial but not a perfect one. *Lutwak v. United States,* 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953). Such was afforded these five defendants.

Accordingly, the decision of the Court of Criminal Appeals is reversed, and the convictions of each defendant, as determined by the jury, is affirmed.

PER CURIAM.

APPENDIX D

The Court of Criminal Appeals of Tennessee
at Jackson

January 1974

Appeal from the Criminal Court of Shelby County
Honorable Perry H. Sellers, Judge

Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilber Lee Pickens,
Plaintiffs in Error,
vs.
State of Tennessee,
Defendant in Error.

No. 41
Shelby County

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Judgment Reversed and Remanded
Opinion by Judge Charles Galbreath

(Filed: June 5, 1974)

Opinion

The five defendants in this case were jointly indicted, tried and convicted of murder in the perpetration of robbery and each sentenced to life imprisonment in the State penitentiary. Each was represented by retained counsel in the trial court and each has filed assignments of error and a brief in support thereof in this Court.

Of the numerous errors assigned by these defendants, those attacking the sufficiency of the evidence and the admissibility of confessions appear to have merit. To bring these contentions into focus, the evidence is summarized as follows:

Approximately three weeks prior to July 6, 1970, a poker game was arranged by Walter Lee (Woppy) Gaddy between the defendant, Robert Hugh Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional Las Vegas gambler, had made arrangements with Gaddy to use the latter's apartment and for Gaddy to make the initial contact with the defendant Wood. Under the arrangement Gaddy was to receive a cut of the winnings for the use of the apartment and for making the set-up. Wood was told that several people were to play in the game, but as planned only Wood and Douglas showed up for the game.

During the first game, Wood lost about "twenty something hundred dollars." A week later, a second game was played at Gaddy's apartment and Wood lost another $1,500 to $2,000. A third game was played a few days before July 6th, but this time between the deceased and Tommy Thomas, an acquaint-

ance of Wood who had a reputation of being a "pretty good" poker player. Thomas played with $1,000 of which $600 had been put up by Wood. The purpose of this game was to determine if and how the deceased was cheating. Thomas, however, was the son of Titanic Thomis, a well known professional gambler and a close friend of the deceased. Tommy, as prearranged with the deceased, lost the game and reported to Wood that as far as he could tell the deceased was not cheating. Actually cheating was accomplished by transferring a small amount of colored wax onto white areas of the playing cards from a supply of the substance, called a "dob" by the witness Thomas, concealed under the shirt collar of Douglas in a small metallic container.

A fourth game between Douglas and Wood was set up for July 6, 1970, at Gaddy's apartment. Wood, still suspecting that Douglas was cheating, took his brother Joe along with him. Tommy Thomas was also present at the game. Joe had arranged for the other co-defendants, Randolph, Hamilton and Pickens, to come by the apartment to help get his brother's money back by staging a "hold up".

During the course of this fourth game, Joe Wood left to get some beer. When Joe returned with the beer, Tommy Thomas and Douglas heard others outside the apartment, and fearing a robbery attempt Douglas brandished a .38 caliber pistol and an automatic shotgun. Joe convinced them that he was alone, but as a precautionary measure, Douglas made Joe enter the apartment through a small window. After this incident Robert Wood wanted to stop the game and leave, but Douglas insisted that the game continue. The game was resumed and after a few minutes Joe Wood went to the bathroom. On his return he was carrying a small caliber derringer pistol, and he ordered Thomas and Douglas to lie on the floor. Thomas complied with the demand but Douglas remained seated at the table. Joe handed the gun to his brother and left through the front door. According to his undisputed testimony Robert Wood stood there with

the gun down by his side, and when Thomas got up from the floor and was in the process of locking the front door he saw Douglas make a move and shot him as the deceased was reaching for his gun. Immediately following the shooting, Joe and the other three co-defendants forced their way into the apartment. The money on the table was taken, as was a knife and about $50 from Tommy Thomas, and then all five of the defendants fled.

While we are well aware of the presumptions and burden of proof facing the defendants in their challenge on the sufficiency of the evidence, we are also aware of our duty to intercede and reverse the trial court where the evidence is clearly insufficient to support the conviction. Under the facts as presented in this particular case, we must follow the latter course of action.

There is nothing in this record to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confessions of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.

The defendants have also challenged the admission into evidence of the confessions of the co-defendants Randolph, Hamilton and Pickens and the statement of Robert Wood. Their contention is that since the confession implicates not only the confessing defendant but also other co-defendants, and since the confessing defendants did not take the stand, the co-defendants were denied their Sixth Amendment right to confrontation of witnesses against them. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620. This claim appears to have merit as regards the confessions of Randolph, Hamilton and Pickens but

not regarding Robert Wood's statement. Robert Wood took the stand and was therefore subject to cross-examination by the other defendants.

Although an attempt was made to avoid prejudice to the other defendants by omitting their names from the confessions as read to the jury, a reading of the confessions clearly indicates that mere omission of names was not sufficient to avoid harm to the other defendants. As judge Dwyer said for this Court in *White v. State*, 497 S W 2d 751:

> "To assume, as urged here by the state, that the insertion of 'the other person' cured any possible prejudice to Johnson would be legal sophistry. Or as Justice Learned Hand states, it would be a 'mental gymnastic which is beyond not only their (the jurors') powers, but anybody elses.' See Nash v. United States, 54 F 2d 1006, 1007 (2nd Cir. 1932). We have stated before that a statement of the confessing co-defendant could be used only if completely stripped of any incriminating references to the non-confessor. See Taylor v. State, Tenn. Cr. App., 493 S W 2d 477. In this context the insertion of 'the other person' does not meet that test. See Serio v. United States, 131 U S App D.C. 38, 401 F 2d 989, 990."

While reversal is not predicated solely on the incorrect admission of these confessions, such would have been the case had there not been any other error found by this Court.

All of the other assignments of error have been considered and found to be without merit. The case is reversed and remanded for a new trial consistent with this opinion.

/s/ CHARLES GALBREATH, Judge

CONCUR:

/s/ W. WAYNE OLIVER, Judge
JOHN A. MITCHELL, Judge

Dissenting and Concurring Opinion

I respectfully dissent in part and concur in part.

I agree that the admission in evidence of the confessions of the non-testifying co-defendants was a violation of the rule in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476, and prejudicial to the rights of those defendants who were deprived of the right to cross-examine the non-testifying co-defendants and therefore constituted reversible error. See opinion by Judge Robert K. Dwyer in *White v. State*, — Tenn. Crim. App. —, 497 S.W.2d 751.

Robert Wood contended that although the words "other party" and "another party" were substituted for the name "Robert Wood" in the statements of the co-defendants it was easy to see that Robert Wood was the name that had been eliminated from the statements.

Robert Wood may have been identifiable from his co-defendants' statements but, I am unable to find any merit in this contention because in the statements of Pickens and Hamilton they told about Robert Wood shooting Douglas. They heard the shot and on entering the room they saw Robert Wood with the pistol in his hand and Douglas lying on the floor. They heard Robert Wood say he shot Douglas. They also told about the plan to rob the poker game which was organized by Robert Wood's brother Joe Wood.

Robert Wood took the witness stand and testified substantially to a great many of the material facts contained in his co-defendants' statements.

Robert Wood told his brother Joe that the deceased was cheating and he intended to get his money back. That several people there had guns and he might need some help to get it

back. And he said he would bring somebody with him that worked for him.

Robert Wood said "If I caught the man cheating I was going to demand my money back and I did not figure he would be willing to give it up that easily.

On cross-examination Robert Wood was asked "so you could say that they were coming there to rob this man, is that correct?" Robert Wood answered, "Well, if you call it that, I would call it if you had been cheated out of your money, you just got your money back it wouldn't be considered as robbing somebody." Robert Wood said he did not catch him cheating and he did not ask for his money back.

That his brother Joe was to see to it that they got there. That he sat down and started playing again.

That he saw his brother come back in with the three male blacks, the co-defendants Wilber Pickens, Isaiah Hamilton and James Randolph with weapons and that he knew one shot was fired.

Robert Wood said he went there to get even if he could. That his brother Joe Wood said "he could bring some help if I thought I would need it." That the man might not want to give the money back, but he intended to get his money back if he caught him cheating. That he let his brother know he wanted him to bring help if he wanted to, that he did not tell him whether to come armed, that he figured his brother Joe would have a gun on him or in the car. That Joe said some of his help would be with him.

The district attorney asked "In talking about the understanding you had with your brother Joe Wood," "Now you've already said as I understood you that you asked him or that you agreed that he was going to bring some help because you were going to ask for your money back if you caught him cheating, is that

right?" The defendant Robert Wood answered "That's right." That he told Joe where the place was.

The defendant Robert Wood also testified he talked with his brother Joe Wood about getting his money back and that he wanted his brother to bring help if he wanted to do so. That he figured his brother Joe would either have a gun on him or in his car. That his brother Joe told him some of his help would be there. Robert Wood said he helped to plan the game in order to get back what he had lost. That he had lost heavily, perhaps $4,000.00. That his brother Joe came along armed and furnished him the pistol with which he shot Douglas. That he shot and killed Douglas and then took the money which was over $2,000.00 from the gambling table. That they planned what story they would tell if arrested, and he cautioned his confederates not to involve him and Joe on the matter and fled. That the next morning he went back to Mississippi.

I do not think the defendant Robert Wood can escape the responsibility for his acts by saying he did not know of the robbery, or if he did know of it, the re-taking of the money was in a fake robbery and was for the purpose of recovering money illegally taken from him by a cheating gambler.

It seems to me that having testified about the facts contained in the statements of his co-defendants his testimony cleared or cured whatever objection he might make to the introduction of his co-defendants' statements.

In *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288, the Supreme Court said:

> "There are many cases in this jurisdiction and others which deal with the broad principle that if a defendant testifies in substance as to evidence which has been otherwise erroneously admitted, then his testimony clears whatever error there might have been. See *Zachary v. State*, 144 Tenn.

623, 234 S.W. 758; *Moon v. State*, 146 Tenn. 319, 242 S.W. 39; *Switzer v. State*, 213 Tenn. 671, 378 S.W.2d 760; *Owens v. State*, 202 Tenn. 679, 308 S.W.2d 423; *Cathey v. State*, 191 Tenn. 617, 235 S.W.2d 601; and others. Thus, these cases clearly show that the rule is not limited to the situation where the defendant takes the stand and admits he committed the crime with which he was charged."

In *McClain v. State*, — Tenn. Crim. App. — 455 S.W.2d 942, in an opinion by Judge Charles Galbreath, concurred in by Presiding Judge Mark A. Walker, and result concurred in by Judge W. Wayne Oliver, we cited and quoted *Hill v. United States*, 363 F.2d 176 (5 Cir.) where the Court said:

"We reject this assigned error for a second and entirely different reason. When Hill testified in his own behalf, he substantially repeated the accountant's testimony which is complained about in this assignment. If there was any error in the admission of the accountant's testimony, it was cured by Hill's testimony to the same facts. See *Barshop v. United States*, 192 F.2d 699 (5th Cir. 1951), cert. den. 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 688 (1952). Thus we find no prejudicial error in the admission of the accountant's testimony, or the trial court's refusal to withdraw it from the jury's consideration. 363 F.2d 180, 181."

In *McGregor v. State*, — Tenn. Crim. App. —, 491 S.W.2d 619 cert. denied March 1973, in an opinion by Judge Robert K. Dwyer, concurred in by Walker, Presiding Judge, and O'Brien, Judge, we said:

"Further, when the defendant voluntarily took the witness stand at the trial and gave testimony explaining the presence of the weapon and the satchel that were introduced, he cured any illegal search question, because his own words established the existence of these two articles in his car. See *Lester v. State*, 216 Tenn. 615, 624, 393 S.W.2d

288. The assignment pertaining to the legality of the search is overruled."

Able counsel for the defendant Robert Wood in his excellent brief has made the contention that a new trial should be granted to Robert Wood because of the erroneous introduction of the statements of the non-testifying co-defendants in which they identified Robert Wood as the man who shot and killed William Douglas.

In considering this contention we are faced with the plain and positive fact that Robert Wood voluntarily took the witness stand and testified in his own behalf and admitted he fired the pistol shot which killed Douglas.

I think this contention is without merit.

I cannot agree with the majority opinion holding that the killing was not done in the perpetration of a robbery.

The robbery was planned for the purpose of assisting the defendant Robert Wood to recover the money he had lost in a gambling game with the deceased William Douglas.

I think the facts show that the robbery was commencing according to plan at the place and at the time of or a few seconds before Robert Wood shot and killed the deceased Douglas. Those who were to commit the robbery were at the door preparing to enter. It is true that the actual taking of the money was subsequent to the fatal shooting of Douglas.

The defendant Robert Wood testified he took the money from the table immediately after he shot Douglas.

I cannot agree with the holding of the majority opinion that the evidence is insufficient to support the conviction of Robert Wood. Robert Wood in his testimony says he shot and killed the deceased William Douglas at a time when Douglas was reaching for his gun.

The jury heard all the proof, saw and heard the witnesses testify, including the defendant Wood. The jury rejected the defendant Robert Wood's theory that he shot in his own necessary self defense.

The verdict of the jury approved by the trial court takes away the presumption of innocence which stood for the defendant in the trial court and he is here under the presumption of guilt. The burden is on the defendant to show that the evidence preponderates against the verdict. We may not reverse a conviction on the facts unless the evidence preponderates against the verdict and in favor of his innocence. *White v. State*, 210 Tenn. 78, 356 S.W.2d 411; *Holt v. State*, 210 Tenn. 188, 357 S.W.2d 57; *Gann v. State*, 214 Tenn. 711, 383 S.W.2d 32.

Moreover, it was the province of the jury to settle the issue of self defense. The jury heard the witnesses and observed them on the witness stand, passed on their credibility and decided in favor of the state's contention. I am unable to say that the evidence preponderates against the finding of the jury. *Arterburn v. State*, 216 Tenn. 240, 391 S.W.2d 648; *King v. State*, — Tenn. Crim. App. — 432 S.W.2d 490.

I would hold that the evidence does not preponderate against the jury's verdict and in favor of the innocence of the defendant Robert Wood.

In *Grace v. State*, 493 S.W.2d 474 (1973), the Supreme Court of Tennessee in reversing the judgment of the Court of Criminal Appeals said:

> "Neither this Court, nor the Court of Criminal Appeals is free to re-evaluate the evidence as it pleases. A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt upon appeal. The defendant has the burden upon appeal of showing that the evidence preponderates against the verdict (and) in favor of his innocence."

I would affirm the judgment against the defendant Robert Hugh Wood.

/s/ JOHN A. MITCHELL
Judge

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-99

CHIEF HARRY PARKER,
Petitioner,

v.

JAMES RANDOLPH, WILBUR LEE PICKENS and
ISAIAH HAMILTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1978
CERTIORARI GRANTED NOVEMBER 27, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-99

CHIEF HARRY PARKER,
Petitioner,

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

TABLE OF CONTENTS

Page

FROM THE TRIAL RECORD:

1. Signed Statement of Robert Hugh Wood (Exhibit 31, pg. 381, Vol. 4, State Record) 1
2. Redacted Statement of Robert Hugh Wood, read during the testimony of Detective Lewis (pp. 399-433, Vol. 4, State Record) 61

3. Testimony of Robert Hugh Wood (pp. 884-925, Vol. 7 and Vol. 8, State Record) 106

4. Police Record of Isaiah Hamilton's Oral Statement (Exhibit 33, p. 547, Vol. 5, State Record) 150

5. Signed Statement of Isaiah Hamilton (Exhibit 34, p. 547, Vol. 5, State Record) 152

6. Testimony of Detective Lewis regarding oral statement of Isaiah Hamilton (pp. 559-560, Vol. 5, State Record) 160

7. Testimony of Lt. Terry E. Merritt regarding first oral statement of James A. Randolph (p. 630, Vol. 6, State Record) 162

8. Testimony of Detective Lewis regarding second oral statement of James A. Randolph (pp. 670-671, Vol. 6, State Record) 143

9. Signed statement of Wilbur Lee Pickens (Exhibit 35, p. 765, Vol. 7, State Record) 164

10. Redacted statement of Wilbur Lee Pickens, read during testimony of Detective Robert N. Straton (pp. 772-777, Vol. 7, State Record) 170

11. Testimony of Thomas Edward Thomas (pp. 160-174, 186-210, Vol. 3, State Record) 176

FROM THE STATE APPELLATE COURTS:

12. Court of Criminal Appeals of Tennessee at Jackson, Opinion: (Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilber Lee Pickens v. State of Tennessee) 215

Dissenting & Concurring Opinion (Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilber Lee Pickens v. State of Tennessee 220

13. Supreme Court of Tennessee at Jackson, Opinion: (State of Tennessee v. Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilber Lee Pickens) 227

FROM THE DISTRICT COURT RECORD:

14. Petition for Writ of Habeas Corpus (Randolph) (2-20-76) 247

15. Amendment to Petition for Writ of Habeas Corpus (Randolph and Pickens) (2-27-76) 256

16. District Court Order of Consolidation (Randolph and Pickens) (2-27-76) 258

17. District Court Order to Show Cause (Randolph and Pickens) (2-27-76) 259

18. Response to Order to Show Cause (Randolph and Pickens) (3-17-76) 259

19. Order of Reference to Magistrate (Randolph and Pickens) (3-18-76) 264

20. Petition for Writ of Habeas Corpus (Hamilton) (7-1-76) 264

21. District Court Order to Show Cause (Hamilton) (7-7-76) 272

22. Response (Hamilton) (8-3-76) 274

23. Magistrate's Preliminary Report on Habeas Corpus Application (Randolph and Pickens) (9-17-76) .. 279

24. District Court Order of Consolidation and Appointment of Counsel (9-22-76) 296

25. Second Amendment to Petition for Writ of Habeas Corpus (Hamilton) (11-10-76) 297

26. Second Amendment to Petition for Writ of Habeas Corpus (Pickens) ((11-10-76) 300

27. Second Amendment to Petition for Writ of Habeas Corpus (Randolph) (11-10-76) 304

28. District Court's Second Order to Show Cause (12-22-76) 307

29. Respondent's Second Answer (1-13-77) 308

30. District Court Order of Reference to Magistrate (1-17-77) 315

31. Magistrate's Supplemental Report on Reference (2-10-77) 315

32. District Court Order Dismissing Certain Claims and Order Granting and setting Hearing as to the other claims and Authorizing Writ of Habeas Corpus for Petitioner Pickens (3-23-77) 319

33. District Court Memorandum Decision, Chief Judge Bailey Brown (5-2-77) 321

1. SIGNED STATEMENT OF ROBERT HUGH WOOD

STATEMENT OF: ROBERT HUGH WOOD, male white, age 35, 124 Air Base Sub-Division, Columbus, Mississippi, phone area code 601, 434-8435, salesman, made at Central Police Headquarters, Thursday, July 9th, 1970, at 1:15 p.m., to Lieutenant B. N. Linville, Detective J. A. Dungan, Patrolman D. O. Lewis, in the presence of Attorney M. A. Hinds, Attorney Harry Scruggs Jr., and Mr. John Wood. This statement transcribed from tape.

Typed by: Jeanne Powers

Statement relative to the fatal shooting of WILLIAM DOUGLAS, male white, age 52, alias BILL, on Monday, July 6th, 1970, at approximately 9:25 p.m., in an apartment located at 3403 Benbow Drive, apt. No. 1, with a small calibre pistol (weapon) by unknown parties.

This tape was taken in the presence of his attorneys with the understanding that this was to be a material witness statement and that Robert Hugh Wood was not under arrest. The first part of this tape deals with an understanding between the police officers and the attorneys, as to the type of statement being taken. It was also agreed that a photograph would be made by the police photographer to show witnesses in hopes that it would be necessary to hold showups. They did agree for a photograph to be made without B. of I. numbers.

Scruggs: Just for the record, I'd like to get the names of everyone in the room. What's your name, sir?

Lewis: D. O. Lewis.

Dungan: J. A. Dungan.

Linville: B. N. Linville.

Hinds: M. A. Hinds.

John Wood: John Wood.

Scruggs: Mr. Wood?

Robert Wood: Robert Wood.

Linville: Just tell us what happened.

Robert Wood: The night, Monday night, I met my brother at the Krystal on Winchester. I'd say ten after seven.

Linville: Okay, sir.

Robert Wood: We went on down to apartment one, I don't know the number.

Lewis: Which apartment was that?

Robert Wood: Joe Wood. A man known to me as Ray opened the door to apartment one.

Dungan: Is that apartment one at the Benbow Apartments?

Robert Wood: Yeah.

Linville: A man known to you as Ray?

Robert Wood: He said his name was Ray Blaylock.

Dungan: That's the man that was later killed that night, right?

Robert Wood: Right.

Dungan: Okay.

Robert Wood: He was watching a television program, and as soon as that was over, about, well, it had to be over at seven thirty, it was Gunsmoke, we went to Lowenstein's East and bought some plastic cards.

Dungan: Who all went to Lowenstein's, Mr. Wood?

Robert Wood: Me, and him and my brother.

Dungan: Just the three of you?

Linville: Now that was Lowenstein's in Whitehaven, am I correct?

Dungan: Was it the three of you that went to Lowenstein's?

Robert: Well, it was another boy there—I don't know, I know his first name, I don't know——

Dungan: Who was that?

Robert Wood: Tommy.

Dungan: Okay.

Robert Wood: We bought the cards and came back to the apartment.

Hinds: How much did you pay for the cards?

Robert Wood: Four seventy-five.

Dungan: Plastic playing cards?

Robert Wood: Yes, sir.

Dungan: Okay, sir.

Robert Wood: And, uh——

Hinds: Who paid for the cards?

Robert Wood: Well, we paid five dollars each for 'em.

Dungan: Who handed the clerk the money? Who actually transacted the business there?

Robert Wood: I laid a ten dollar bill on the counter, and he gave me a five.

Duncan: I see. Who gave you five—the man that got killed?

Robert Wood: Yes, sir.

Dungan: Okay.

Robert Wood: We went back to the apartment.

Dungan: Was this Tommy at the apartment when you arrived?

Robert Wood: No, he came in after, I did.

Dungan: Before you went to get the cards, though?

Robert Wood: Yes, sir.

Dungan: Okay, go ahead from there.

Robert Wood: We started playing cards, I don't know, 'bout the time it took us to go out there and back, I guess it was five or ten minutes till eight, and about, oh, somewhere between nine fifteen and nine thirty.

Lewis: Who all was playing cards?

Robert Wood: Me and one man.

Dungan: The one you knew as Blaylock?

Robert Wood: Yes, sir.

Dungan: What happened about nine fifteen? Or whatever you said?

Hinds: Before that—how much money was on the table?

Robert Wood: Approximately twenty-five hundred dollars.

Hinds: That money was yours?

Robert Wood: I had eighteen hundred dollars involved.

Dungan: All right—that was your part, eighteen hundred dollars involved in the game. Right? Get on to what happened at this time, you say about nine fifteen or nine thirty.

Robert Wood: About two or three loud kicks and the door came in——

Dungan: Which door was that?

Robert Wood: The front door.

Dungan: All right, what happened then?

Robert Wood: Ray jumped up and I guess he was reaching for a gun. I didn't see it but I——

Linville: Didn't you tell me this morning you thought he had the gun on him?

Robert Wood: I said he had a .38 on him. I'm sure he had a .38 on him.

Linville: And he jumped, and then what?

Robert Wood: There were some shots fired—they were all in the apartment. I was sitting next to the wall and he was sitting back to the kitchen and I was behind the partition there and the shots were fired. They didn't—I don't know whether they seen me or not. I got out the door. The door was kicked open and left open.

Dungan: Who are you talking about they?

Robert Wood: When the door was kicked open, I seen two or three colored guys and shot by——

Linville: You told me three.

Robert Wood: I think it was three. Had a shotgun——

Linville: One had a shotgun.

Robert Wood: And two pistols.

Dungan: Each one had a pistol and one had a shotgun—what you believe to be a shotgun.

Robert Wood: I think it was a sawed off shotgun. I'm not sure.

Dungan: Who fired the shots? Did the—Ray——

Robert Wood: I'm not sure of some of it. Sounds like two shots fired, and I was behind the partition.

Dungan: Which partition are you talking about, Mr. Wood?

Robert Wood: Right inside the front door—it's a little partition——

Dungan: To the left as you walk in the door?

Robert Wood: Yes, sir.

Dungan: And you were sitting with your back to the wall which I believe would be the west wall. Is that correct?

Robert Wood: Yes, sir.

Dungan: All right. After the shots were fired, what happened?

Robert Wood: I got out the door that was kicked open, left open and I got to my car which was behind the apartment.

Dungan: Behind the apartment. Parking area parked behind there?

Robert Wood: Well, it was on the west, naw, east side a little bit behind the driveway.

Dungan: In the indented place that comes out there?

Robert Wood: Yeah.

Dungan: Did you see Ray pull his gun out?

Robert Wood: Just seen him jumping up and reaching for it. I don't know whether Ray ever got it out or not.

Dungan: Who all were in the apartment when these Negroes came in?

Robert Wood: Me, this boy known as Tommy, my brother and him.

Linville: Now when you say your brother, you're talking about Joe?

Robert Wood: Joe Wood.

Dungan: All right, you ran straight out the front door and which way did you go around the apartment?

Robert Wood: I went out the front door and around to the east, to my car.

Dungan: You went around toward the driveway on the east side of the apartment and went straight to your car?

Robert Wood: To my car.

Dungan: What kind of car do you drive Mr. Wood?

Robert Wood: A '67 Plymouth.

Dungan: What color is it?

Robert Wood: Blue.

Dungan: Solid blue?

Robert Wood: Yes, sir.

Dungan: Which way did you leave?

Robert Wood: Off——

Dungan: You know where I understand you were parked, you could either go around the circle and go out the west side or——

Robert Wood: I came straight out on the east side of the building.

Dungan: In other words, you pulled out, backed up apparently, or however you parked?

Robert Wood: Yes, sir.

Dungan: And went back down the east side. Right?

Robert Wood: I backed up and came out the east side.

Linville: Who met you at the car?

Robert Wood: My brother was there, right behind me.

Linville: You talking about Joe?

Robert Wood: Joe, yes, sir.

Dungan: Did Joe go directly to the car with you or did he meet you out there?

Robert Wood: Well, he met me out there. I run in the shooting. I wasn't looking anywhere, just getting loose from all the shooting.

Dungan: What happened to the fellow, Tommy?

Robert Wood: I don't know, sir.

Dungan: Did you see Mr.—I'm going to call him Douglas from now on—you call him Blaylock. You understand we are referring to Blaylock, Douglas be the one you refer to as Blaylock. Did you see what happened to Blaylock or Douglas after the shots were fired—did you see him fall? Did you know he was hit?

Robert Wood: I heard some shots and apparently two—I don't know—I didn't know—I didn't see him hit or didn't know who was hit, didn't know whether it was his shot or whose shot it was.

Dungan: All right. Now this fellow, Tommy, will you describe him to me?

Robert Wood: About thirty years old——

Dungan: He is a white man isn't he?

Robert Wood: Right. Yes, sir.

Dungan: How tall is he?

Robert Wood: Close to six foot.

Dungan: What kind of build has he got? Compared to yourself. Stocky? Slim? Or——

Robert Wood: Oh—he's not quite as heavy as I am, I don't guess. Probably 170 to 180 lbs.

Dungan: What kind of looking hair has he got?

Robert Wood: He's got—his hair's longer than mine—it ain't real long.

Dungan: Is it combed back, kind of like yours? Is his hair line as far back as yours?

Robert Wood: No—he's got a lot more hair than I've got.

Dungan: Is it the color of yours? Darker like mine or like Mr. Scruggs here?

Robert Wood: I'd say it's about the color of yours.

Dungan: What kind of clothes did Tommy have on?

Robert Wood: Well, he was wearing tight britches and I couldn't even——

Dungan: What do you mean, tight britches?

Robert Wood: I don't know.

Dungan: New kind?

Robert Wood: Yes.

Dungan: Do you remember what color they were?

Robert Wood: Grayish.

Dungan: How about his shirt? What type? Did he have a tie and shirt on or over shirt or what?

Robert Wood: He had one of these slip over shirts on.

Dungan: Was it dark or light colored?

Robert Wood: It was darker than his pants, I gues, like this.

Dungan: Do you know how Tommy got to the apartment?

Robert Wood: No, I don't. I didn't see a car. He got there right after we did.

Dungan: You don't know how he came?

Robert Wood: No, sir.

Dungan: You don't know how he left and you didn't see him leave? After you and your brother left, you didn't pay any attention to him?

Robert Wood: I didn't see him leave.

Dungan: Did he leave out of the apartment ahead of y'all, or——

Robert Wood: I really don't know. I don't know whether he was ahead of us or behind us.

Dungan: All right, before we get to these Negroes——

Robert Wood: I seen in the paper that the description of——

Linville: Don't believe anything you read in the paper——

Robert Wood: The description fits him, that said, "Call the police." and the boy turned around and disappeared, the one about 180 or 190 lbs.

Dungan: Okay. Let me ask you this. Before we get to the Negroes and what they look like, so we can get a good background on it. You were seated with your back to the wall at the time at the table. Is that right?

Robert Wood: Well, my back was to the partition, it wasn't to the wall——

Dungan: To the partition, just to the left of the front door.

Robert Wood: Right.

Dungan: Okay. Now where was Douglas, or Blaylock as you call him?

Robert Wood: Straight across from me—his back was to the kitchen.

Dungan: To the kitchen door—right?

Robert Wood: Yes, sir.

Dungan: Now where was your brother, Joe?

Robert Wood: Over in the living room.

Dungan: He wasn't seated at the poker table or at the dining room table?

Robert Wood: No, sir.

Dungan: He was in the living room. Right?

Robert Wood: Right.

Dungan: Where was the fellow, Tommy?

Robert Wood: Well, I think—I believe—I forget which way it was arranged. One of 'em was in a chair, and the other one was on the couch.

Dungan: Okay—one in a chair and one on a couch. Right?

Lewis: Did you see a dog?

Robert Wood: Yes, sir—there was a little dog there.

Dungan: There was a dog in the apartment? What kind of looking dog was it?

Robert Wood: A little small, guess it was a Chihuahua.

Dungan: After y'all came back with the cards, you went to Lowenstein's, you said, I believe, on 51 South. The four of you came back together. Whose car did you go down there in?

Robert Wood: Mine.

Dungan: Your car. All right. You got the cards and came straight back to the apartment. Where did you park it? You parked where you got in it. Right?

Robert Wood: Right. Yes, sir.

Dungan: You didn't move it any time?

Robert Wood: No, sir.

Dungan: Did all of you go into the apartment together?

Robert Wood: Yes, sir.

Dungan: Did anybody leave the apartment before the Negroes kicked the door open?

Robert Wood: No, not that I know of.

Dungan: You, Tommy, you or Mr. Douglas, or Joe or Tommy didn't leave?

Robert Wood: No, sir.

Dungan: Is this Tommy a local fellow?

Robert Wood: I really don't know.

Dungan: Have you ever seen him before?

Robert Wood: I have seen him a couple of times.

Dungan: Where did you see him?

Robert Wood: I seen him at the Hershel's Pool Room on Madison.

Dungan: All right, anywhere else?

Robert Wood: No.

Dungan: If you wanted to get in touch with him, would you know how? Would you know somebody to go to that mutually knows him and could get in touch with him?

Robert Wood: Well, not exactly. I don't know his name other than Tommy.

Dungan: Anywhere we could go and ask somebody and say we want to talk to Tommy or you want to contact him, could you do so?

Robert Wood: I don't think so.

Lewis: Whose apartment was it? Whose apartment?

Robert Wood: Well, the man told me that we have regular ring around games here all the time but the man at the apartment—I never did see him.

Dungan: In other words, you don't know the owner of the apartment, the man that occupies it?

Robert Wood: He never was there. I don't know.

Dungan: How many times you been in the apartment before that night?

Robert Wood: Two times before.

Dungan: When was that?

Robert Wood: Thursday, the week before and on Friday, the week before that.

Dungan: Thursday, the week before?

Robert Wood: The Thursday before Monday and then the previous Friday to that.

Lewis: You mean the Friday before the Thursday.

Robert Wood: Uh huh.

Lewis: Three weeks ago?

Robert Wood: Uh huh. Be three weeks this coming Friday.

Dungan: Did y'all have a game then?

Robert Wood: I was told there was going to be a regular game there and I showed up but——

Scruggs: Well, tell him how you knew there was going to be a game there?

Robert Wood: The man I seen at the Southern Frontier.

Scruggs: That's at Bellevue and Madison?

Dungan: Now, let me get back—you were there the previous Friday before and then the Thursday, I'm sorry, the Thursday before Monday night and the previous Friday before that Thursday. In other words it's been about two weeks. Not quite two weeks. All right, now how did you come about going to that apartment to start with the first time?

Robert Wood: A man I seen around town several times, I don't know his name, at the Southern Frontier, said they had a game there on Tuesdays and Fridays.

Hinds: Now when did you see him at the Southern Frontier?

Robert Wood: Well, it was on Friday—he told me about it on Wednesday before the Friday, be two weeks, be three weeks ago yesterday, I guess.

Dungan: Let's go a little further. Let's get these dates straight NOW. It happened on the 6th and you were over there Thursday, July 2nd, 1970. All right, before that—let's go back to June. Now when did you meet this guy at the Southern Frontier in reference to that Friday, June 26th, 1970?

Robert Wood: It was on a Wednesday.

Dungan: Was it Wednesday night, or in the day time——

Robert Wood: Wednesday night.

Dungan: All right, that'd be on the 24th, then, Wednesday, June 24th, 1970.

Hinds: What time did you meet him?

Scruggs: What time of day?

Robert Wood: I was—between ten and eleven o'clock.

Scruggs: Day or night?

Robert Wood: Night.

Dungan: Were you by yourself when you met him or were you——

Robert Wood: I was by myself.

Dungan: All right, you've seen him around town. How did y'all get together at the Southern Frontier?

Robert Wood: Well, I guess. I've seen him in several lounges and pool rooms on one or two occasions.

Dungan: Okay. Did you just meet him in there or did you all sit down and have a beer and drink together or just what?

Robert Wood: Well, he came over to the table where I was at and started telling me about the poker game——

Dungan: He approached you and started telling you about a poker game. What poker game?

Hinds: Exactly tell him what he told you.

Robert Wood: That there was a poker game out on Winchester every Tuesdays and Fridays.

Dungan: On Tuesday and Friday. Okay.

Scruggs: Did he give you the address?

Robert Wood: Yes, sir.

Dungan: The address where it happened. Right? He gave you the actual address, right?

Robert Wood: Yes, sir.

Dungan: Did he ask you if you'd be interested in playing, or what? What happened after that?

Robert Wood: Well, he asked me if I'd be interested in playing and I said yes.

Dungan: Did he tell you anything about the size of the game?

Robert Wood: No, he said it was a pot limit game, played on Tuesdays.

Dungan: What's the limit or what——

Lewis: What did you call this man? Did you know him by name?

Robert Wood: I heard his nickname.

Lewis: What's that?

Robert Wood: Woppy. I don't know his name.

Dungan: Woppy?

Robert Wood: Woppy.

Dungan: Okay. Woppy. Now he told you it was a pot limit game and he told you it was pot limit game and asked you if you wanted to play? Did he invite you over to play——

Robert Wood: Well, he said there was going to be a game Friday, said they were going to play that Friday.

Dungan: Said there was going to be a game that Friday, but there was usually one there Tuesday or Thursday?

Robert Wood: Tuesdays and Fridays.

Hinds: Did he tell you who run the game?

Robert Wood: No, he didn't, sir.

Dungan: He invited you over that particular night and you went over there?

Robert Wood: Yes, sir.

Dungan: All right, what happened that Friday night over there?

Robert Wood: Well, this guy, Ray, opened the door, and he was watching television at the time. Wasn't nobody else there.

Dungan: He was alone. Right?

Robert Wood: Yes.

Dungan: Okay, did you go in the apartment?

Robert Wood: I went in the apartment.

D. L. Lewis: Did you know him previously?

Robert Wood: No, sir.

Lewis: This is the first time you made contact with this man?

Robert Wood: Yes, sir.

Dungan: Did you, did he introduce himself to you? He introduced himself as Ray Blaylock. Right?

Robert Wood: Yes, sir.

Dungan: How long did y'all stay that night? Did y'all have a game between yourselves?

Robert Wood: Yeah—he said we expected some people at any time and we started playing some Rummy at the table.

Dungan: Allright. Did anybody else ever come?

Robert Wood: Nobody ever came. I left. I went over about a quarter till seven and left about eleven o'clock.

Lewis: Did you win or lose?

Robert Wood: I lose. There was twelve hundred and something dollars the first time.

Lewis: Was this all in Rummy?

Robert Wood: Yes, sir.

Dungan: And he was the only one there throughout the game. Right? Was the do there that time?

Robert Wood: Yes, sir.

Dungan: Nobody came or went from the apartment. Right?

Lewis: You went by yourself in your car?

Dungan: Same car?

Robert Wood: Yes, sir—'67 Plymouth.

Dungan: Then after that game, did you have any more contact with Woppy?

Robert Wood: Nothing about the game. I seen him downtown after that.

Dungan: All right, when was that?

Robert Wood: Saturday night. I played pool with him in fact.

Dungan: That would be the next night after the night you played Rummy with him.

Robert Wood: No.

Dungan: It was the night of the 26th you played Rummy—the 27th would be Saturday. Right?

Robert Wood: No, I went back home to Columbus following this game and I came back to town and I played pool with Woppy Saturday night—this past Saturday night.

Lewis: Where?

Robert Wood: On Madison, at Hershel's Pool Room.

Dungan: How did you meet Woppy? Did you meet him at the pool room or where?

Robert Wood: Well, I just went in there and he was playing somebody else pool when I got there——

Lewis: Who was he playing?

Robert Wood: Jack Hunter, he limps—I don't know exactly who.

Lewis: Was Tommy there?

Robert Wood: No.

Dungan: All right, that's on the 4th. I understand you said y'all played twice before on July 2nd, 1970. You played Friday night and you said something about Thursday——

Robert Wood: Thursday.

Dungan: Thursday would be the second?

Robert Wood: Yes, sir.

Dungan: Did you go back to the apartment where you played the Rummy?

Robert Wood: Yes, sir.

Dungan: What caused you to go back on that Thursday night? Did you contact somebody or did they contact you?

Robert Wood: He called up at the pool room while I was up there—and, uh——

Dungan: Who called up there?

Robert Wood: This Ray—it would have been Douglas.

Dungan: When did he call? What day was that on?—to set this game up on Thursday night?

Robert Wood: On Thursday afternoon. Asked me did I want to pay any more.

Linville: Were there any women present?

Robert Wood: No.

Dungan: All right. Then you went over there on Thursday night which would be the 2nd. Right?

Robert Wood: Right.

Dungan: Who was there that time?

Robert Wood: Just him.

Dungan: What time did you go over there that night?

Robert Wood: About seven o'clock.

Dungan: How long did you stay?

Robert Wood: Till between eleven and twelve—I don't know exactly.

Dungan: Okay. What did you play that night?

Robert Wood: We played poker.

Dungan: Poker? Just you and him. Right?

Robert Wood: Right.

Dungan: What kind of cards did you use?

Robert Wood: I used paper cards then.

Lewis: What kind of poker did y'all play?

Robert Wood: Low ball (?)

Dungan: All right. How much did you win or lose that night or—what happened?

Robert Wood: I lose a little over two thousand dollars.

Dungan: Lost two thousand dollars that night? In other words he was in to you for about thirty-two hundred dollars, that night, at this point. Right?

Robert Wood: Right.

Dungan: Okay. Did anybody come in and out during the game?

Robert Wood: No.

Lewis: You were by yourself when you went over there?

Robert Wood: Yes, sir, I was by myself.

Lewis: Same car?

Robert Wood: Yes, sir.

Dungan: Did he get any phone calls while you were there?

Robert Wood: As far as I knew there wasn't no phone in the apartment.

Dungan: Okay. Do you know where he called you from to get you to come over there?

Robert Wood: No, sir.

Dungan: When you left that night, you were in your own car that night. Right? The same Plymouth?

Robert Wood: That's right.

Dungan: That's getting us on through the second. You said you met Woppy at the pool hall on the 4th. Is that right?

Robert Wood: Let's see, Saturday was the 4th. Yes. I believe it was Saturday night when I played.

Dungan: Did he approach you or did you approach him?

Robert Wood: Well, he was playing a guy name Jack Hunter when I went in. I watched three or four games.

Lewis: Where is this?

Robert Wood: At Hershel's on Madison.

Lewis: Pool.

Robert Wood: Yes, sir.

Dungan: This is Saturday night the 4th, before this thing happened on the 6th?

Robert Wood: Yes.

Dungan: What was y'all's conversation that night—you and Woppy?

Robert Wood: Nothing. He, uh, after they broke up, I think, Woppy lost two or three games to him and asked me would I play him any.

Dungan: Did you play him some pool?

Robert Wood: Yes.

Dungan: Did you lose them?

Robert Wood: I won. I won him then.

Dungan: How much did you win?

Robert Wood: One hundred and sixty dollars.

Lewis: What kind of pool did you play?

Robert Wood: Nine ball.

Dungan: A hundred and sixty dollars. All right, what led up to you going back the 6th, Monday night?

Robert Wood: Well, I play quite a bit of cards and I just figured I'd had a chance, and I just knew there was a lot of

smart people in this world. I suggested going and getting the plastic cards.

Dungan: Well now who contacted you to come over there on Monday night? What I'm getting at is how did you come about going Monday night? The 6th? In other words, you saw Woppy before?

Robert Wood: Yeah. Well, on Thursday when I played him, I told him I'd play him some more.

Dungan: You told Blaylock you'd play him some more?

Robert Wood: Yes, sir. I told him I'd play him some more if we used plastic cards and set 'em down on the table and deal from the table.

Lewis: What was the reason for that?

Robert Wood: Well, I suspected him—maybe a little sharper than I was.

Dungan: Let me get at this. I may not be getting the point, or may not understand—but Monday, did you just go over there on your own? They contact you?

Robert Wood: No. On Thursday when I played him, I told him I'd him some more on Monday.

Dungan: Did they call you or make arrangements or anything?

Robert Wood: I just told him I'd meet him over there around seven thirty.

Dungan: You told him you'd meet him there Monday at 7:30 p.m. at night, Monday.

Lewis: You didn't talk to him anytime Monday, other than when you arrived at the apartment? Is that right?

Robert Wood: That's right.

Dungan: You'd already made previous arrangements to play

a game with him Monday night, provided you used plastic cards and not the paper cards.

Lewis: Did he ever contact you by phone?

Robert Wood: No.

Robert Wood: No, sir.

Lewis: He never called you?

Robert Wood: No. He called me up at the pool room?

Lewis: Hershel's? When?

Robert Wood: Uh, for, for a second game he called up there. I was there on—he asked me did I want to play some more.

Lewis: How did he know you were going to be there?

Robert Wood: Well, he didn't know, I guess. I went in there about three o'clock, been in there bout I guess six or seven times.

Hinds: I mean, did he know you went there previously?

Robert Wood: Well, yeah, after the game there.

Dungan: Then he called you up there the second time, he didn't contact you anytime after that by telephone?

Robert Wood: He didn't—I didn't—there wasn't no phone at the apartment. He never, he didn't—I didn't know where he was staying or anything. I didn't know if there was a phone in the apartment.

Linville: Who was to get a cut out of this game for setting it up?

Robert Wood: Well, they were suppose to cut the pot, if it's been a ring around game, but since we were playing, nobody didn't cut in on it. We just played.

Lewis: Nobody was suppose to be given anything? Nobody

he contacted and said I've got a game set up and I'll give you a certain percentage? Of the winnings?

Robert Wood: Not in that apartment. I don't know who was suppose to get any percentage of it. As far as cutting the pot—the pot wasn't cut cause there was just two of us playing.

Dungan: Okay, by pre-arrangement you and your brother, Joe, went over there Monday night, in your car.

Robert Wood: I called my brother Monday afternoon because I was a little short of money, for him, I was going to borrow some money from him was the reason he was there.

Dungan: How much did you borrow from your brother?

Robert Wood: Eight hundred dollars.

Dungan: Is that the reason he decided to go to the game with you?

Robert Wood: He brought the money and met me at the Krystal.

Hinds: Where did you meet him?

Robert Woods: At the Krystal.

Hinds: Did he leave his car there?

Robert Wood: Yes, sir.

Lewis: What kind of car did he leave there?

Robert Woods: I really don't know. It was a blue car but he runs a cleanup shop on Summer, and he drives different cars all the time, and he come and got in the car with me and went on down there. I was waiting inside the Krystal. He showed up—went on and drove in.

Lewis: Hold it. Now, go ahead.

Robert Wood: I was inside the Krystal and he drove up, and I seen him pull in and I just went out, and he got out and came and got in the car with me. He didn't go inside.

Lewis: Do you know what kind of car he was in?

Robert Wood: He was in a blue, I think it was a Chevrolet but I'm not sure. In a blue car.

Dungan: Okay, y'all went straight on to the game?

Robert Wood: Yes, sir.

Hinds: Did you take him back to his car?

Robert Wood: I took him, I took him back and he got out.

Dungan: This was after the shooting?

Robert Wood: Yes, sir.

Lewis: What time was that?

Robert Wood: Nine thirty, nine thirty-five, or soemthing like that.

Dungan: This was immediately after the shooting. You didn't go anywhere else and then come back later?

Robert Wood: No, I didn't.

Dungan: Where did you go after you took him back to his car?

Robert Wood: I just drove around for several hours, and went by his shop the next day and went back to Mississippi.

Dungan: Where did you stay that night?

Robert Wood: I didn't stay anywhere. I just drove around.

Dungan: Drove around all night.

Robert Wood: Yes, sir.

Lewis: Do you know anything that, I mean, do you know anyone that lives out in that area?

Robert Wood: On Winchester? Not real close there—no.

Hinds: Who do you know out there?

Robert Wood: Nobody on Winchester. I know a David Frazier that lives in Whitehaven. I haven't seen him in three or four years but I know him.

Lewis: Do you have any close friends that live in that apartment complex?

Robert Wood: No, sir.

Lewis: In that vicinity of the apartment complex?

Robert Wood: No, sir.

Dungan: Where do you normally stay when you come to Memphis? And spend the night when you don't go back to Mississippi right away?

Robert Wood: I got a girl friend here and I stay with her.

Dungan: All right, do you have a girl friend? Did you go there that Monday night and stay?

Robert Wood: I had been there that day, but——

Dungan: Do you want to tell us who she is?

Robert Wood: Do I have to?

Dungan: Well, we'd like to know.

Robert Wood: She works at the Red Coach Inn.

Dungan: What's her name?

Robert Wood: Sarah John——

Hinds: Y-a-h-n?

Robert Wood: Y-o-o-n.

Dungan: You pronounce it Yonn (phonetic yon—) Yoon.

Robert Wood: Yes, sir.

Dungan: Where does she live?

Robert Wood: On Knight Arnold Road.

Dungan: Is it in an apartment?

Robert Wood: Yes, sir. Sir?

Dungan: On Knight Arnold Road, in an apartment or a house?

Robert Wood: In an apartment.

Dungan: Do you know the number?

Robert Wood: I know the apartment number and the phone number but I don't know——

Lewis: What's the phone number?

Robert Wood: 362-2659.

Dungan: But you didn't go there this night. Did you go by the Red Coach Inn after this thing happened and talk to her?

Robert Wood: She knows nothing about it.

Dungan: All right—let's get back to the poker game now. You said you, I think you said they were eighteen hundred dollars in to you—you had eighteen hundred dollars in the game.

Robert Wood: Well, that was on the table. I wasn't much loser, I——

Dungan: Did you pick the money up and take it with you or——

Robert Wood: No, sir.

Dungan: When the fellow started kicking the door, you didn't grab your money up?

Robert Wood: I didn't have time.

Dungan: Who did? Grab the money up?

Robert Wood: I didn't see anything. When I left there it was still on the table.

Dungan: You backed behind the partition? Right?

Robert Wood: Yes, sir.

Dungan: Well, surely you would have been able to see the table from where——

Robert Wood: I could see the table but when I left there the money was still on the table.

Dungan: Well, when these guys started kicking the door, what was y'all's immediately reaction?

Robert Wood: Well, it scared us all, I think, we both knew what it was, and I jumped up and stood against the partition and he was jumping up from the table and was reaching——

Dungan: What do you mean you think he was going for a gun?

Robert Wood: Well, he was reaching for his pocket. I never did see him get the gun out cause I heard a shot.

Lewis: You know he had a gun?

Robert Wood: Well, he had on britches where you could see it in his pocket.

Mr. Scruggs: Was it a revolver or an automatic?

Robert Wood: It looked like a .38 revolver.

Mr. Scruggs: Stuck down—bulging out of his pocket?

Robert Wood: Yes, sir—he on, he had on——

Mr. Scruggs: With the butt of the pistol sticking out where you could see it?

Robert Wood: Yes, sir.

Mr. Scruggs: The grips on the pistol where you could see 'em.

Dungan: In other words you know he had a pistol. You're saying that. Right?

Robert Wood: Yes, sir.

Hinds: How much money would you estimate, total, was laying on the table?

Robert Wood: Approximately twenty-five hundred dollars.

Hinds: Could have been more?

Robert Wood: It could have been four or five hundred more.

Lewis: Were y'all playing table stakes?

Robert Wood: Yes, sir.

Dungan: Were you winning or losing at this point?

Robert Wood: Well, I ahead, we'd been playing about an hour and I was very little beaten, about two or three hundred at least.

Dungan: In other words you were fairing better than you had before? Right? With the plastic cards, not the paper cards?

Robert Wood: Right. We went to Lowenstein's and got them.

Lewis: Were there any words said when they first kicked the door open and came in?

Robert Wood: No, sir.

Lewis: They didn't say a word? Who came in?

Robert Wood: Three niggers.

Lewis: Did they come inside?

Robert Wood: Yes.

Lewis: How did you get by them, when you ran out the door?

Robert Wood: They were inside and I's around that partition and out the door. It was wide open.

Lewis: You're saying there wasn't any white man that come in with them?

Robert Wood: I didn't see a white man involved—except the ones involved in the poker game.

Lewis: That's what I thought you were saying. As far as you know there wasn't a white man involved in the robbery?

Robert Wood: The only white men I seen was is the ones I saw inside the apartment.

Dungan: You, you heard the kicking on the door. You got up, backed against the partition and Blaylock or Douglas stood up where he was standing. You saw him going for his pocket?

Robert Wood: Yes, sir.

Dungan: Then what happened?

Robert Wood: The shots were fired——

Dungan: How many shots?

Robert Wood: I heard two shots before I got away.

Lewis: Were they the same sounding shots?

Robert Wood: Well, I couldn't tell. I was so scared I couldn't tell one shot from another except it wasn't a shotgun.

Lewis: Did it sound like it came from the same pistol? Or were they different sounding calibre shots?

Robert Wood: I couldn't tell. Loud noises——

Dungan: Let's describe these three fellows you saw come in the door.

Robert Wood: All I seen was—the—kicked the door in and all of 'em rushed in together.

Dungan: The front door?

Robert Wood: Yes, sir.

Dungan: All right, did they come up to the table where you were or did they go in the living room or did they go back in the kitchen, or where?

Robert Wood: After the shots, two of them run by there and I jumped out the door.

Dungan: Two of them run by where now?

Robert Wood: Down that hallway—the doors to both bedrooms was closed and stayed closed all the time I was there. Two of 'em ran down the hall.

Dungan: Where did the other one stay?

Robert Wood: I didn't see him. I got out the door, getting out as fast as I could.

Dungan: Did all three of them come by you where you could get out or did one stand in the door or what?

Robert Wood: They were all by me cause I didn't see anybody when I left there.

Lewis: Did they ever point the pistol or say anything to you?

Robert Wood: Wasn't a word said.

Lewis: Kicked the door in and started shooting?

Robert Wood: Well, probably wouldn't have started shooting, I figure they seen him reaching for a gun—he probably had it in his hand by that time.

Lewis: Was he wearing any jewelry?

Robert Wood: Nothing but a watch.

Lewis: No ring?

Robert Wood: No, sir.

Dungan: You didn't see what they did around the table or who got the money? You didn't get the money? Your brother didn't get the money to your knowledge?

Robert Wood: No, sir.

Dungan: How about this other fellow—was he diving for the money?

Robert Wood: I didn't see him after that.

Dungan: You didn't even see your brother as I understand it?

Robert Wood: No, sir.

Dungan: Until you got to the car?

Robert Wood: He was at the car, right behind me.

Lewis: Behind you?

Robert Wood: Behind me. My car was locked and by the time I got it unlocked, he was on the other side.

Lewis: What did your brother say when he got there?

Robert Wood: He didn't say nothing. I just said let's get out of here.

Dungan: He didn't tell you anything about what he saw?

Lewis: You said, "Let's get the hell out of here?"

Robert Wood: No. I was at my car. I just unlocked the door.

Lewis: I understood Mr. Scruggs to say, "Let's get the hell out of here." and I thought that's what you had told him. I was just asking.

Robert Wood: I wasn't wasting no time talking—I was moving!

Mr. Scruggs: Did Joe ever tell you later on what he saw?

Robert Wood: I hadn't talked to him much. He called me at home in Columbus, last night and said he was gonna get an attorney and turn hisself in. I said, "Well, I guess that'd be the best thing to do. I think I'll come up and do the same thing." I called him last night and he recommended that I come in this morning.

Dungan: Called Mr. Scruggs?

Mr. Scruggs: You know, I told you to come in and we'd surrender. Let me ask you this, can you identify any of the male Negroes? Were they all male Negroes?

Robert Wood: Yes, sir.

Mr. Scruggs: Can you describe their height of any of those Negro men? How tall were they? Were they my height—I'm 5′9″.

Lewis: Let's just take the number one male colored and see what you can do with it.

Hinds: Compare him in height with yourself.

Mr. Scruggs: What was the first colored man in height, just tell the detectives, describe him—hair, everything. How tall was he?

Robert Wood: There was one around 6′ and the other two —seemed like they were 5′7″ 5′8″ 5′9″ somewhere in that vicinity.

Dungan: How old a man were they?

Robert Wood: I couldn't see very much, I'd say—they wasn't real young. They was twenty-five or thirty-five.

Lewis: Which ones were armed?

Robert Wood: All three of them were armed.

D. O. Lewis: What did the taller one have?

Robert Wood: I don't recall. I just heard a shot and got out of there in a hurry cause the door was wide open.

Dungan: Was he slim build, fat or skinny or what?

Robert Wood: Well, I think the tall one was about my size —the other two were——

Dungan: What would you call yourself? Heavy? Medium Heavy?

Robert Wood: Heavy. I weigh a little over two hundred.

Mr. Scruggs: What kind of clothes that tall man have on?

Robert Wood: I really don't know what kind of clothes he had on.

Dungan: Can you say whether they had on suits and ties, overalls, levis, or——

Robert Wood: No, no—they had on older clothes. They didn't have regular overalls on, I think they just had, well, it happened so fast I can't describe 'em.

Lewis: Were they loudly dressed? Flashly?

Robert Wood: No, sir.

Dungan: Did they have on bell-bottom—clothes like that—high pocket pants or—just average clothes or what?

Robert Wood: Just average clothes. They wasn't no fancy clothes.

Lewis: You said you saw one of them with a shotgun. Do you know which one you saw with a shotgun?

Robert Wood: It wasn't the tallest guy—he had a pistol.

Dungan: What kind of looking pistol did he have?

Mr. Scruggs: Was it blue steel, nickel plated or what?

Robert Wood: I couldn't tell.

Lewis: Automatic, revolver?

Robert Wood: There's no way I can tell. I don't know.

Dungan: Can you identify them. If you saw them again would you recognize them?

Robert Wood: I doubt it cause I——

Lewis: Is there any explanation about that?

Robert Wood: The best I know—he kept 'em there to keep people from busting in.

Lewis: Was there any discussion about it?

Robert Wood: Wasn't no discussion—the front door didn't have the same bar across it—it had a two by four that he braced up on each. up underneath it.

Lewis: Was that up there at the time the door was kicked?

Robert Wood: Yes, sir.

Mr. Scruggs: The brace was on the door at the time it was kicked?

Robert Wood: Well, it was across it—I don't know if it was braced up or not.

Dungan: All right, let me ask you this. When you went out the front door, who was outside the apartment?

Robert Wood: I seen some people there but I was moving so fast I——

Dungan: Where did you see them?

Robert Wood: In the doorways.

Dungan: Of what?

Robert Wood: I can't recall. I didn't stop to look at anybody. I just ran but I did see some people out there.

Dungan: How about on the parking lot?

Robert Wood: I didn't see anybody at the parking lot. When I got to my car. The time I got to my car—the time I got the door unlocked, my brother was standing at the door. I'd done got in and he was standing at the door the time I got in.

Lewis: Did you have a gun?

Robert Wood: No, sir.

Lewis: You carry a gun?

Robert Wood: Lotta times I got one in my car.

Lewis: What kind?

Robert Wood: A .38.

Lewis: Did Joe have a gun?

Robert Wood: No.

Lewis: Tommy?

Robert Wood: If he did, I didn't know it.

Lewis: The only one you knew that was armed was Douglas?

Robert Wood: Yes, sir.

Dungan: Mr. Wood, look at these photographs of male coloreds here. We have some snapshots and also I'll let you look at the mug shots. Concentrate on them carefully and your memory may bring back to you what they looked like and you may recognize some of them. Look very closely. Take your time with them.

Robert Wood: I think one of these boys worked at my brothers cleanup shop at one time.

Dungan: The one that came in the apartment or the one, or one of these——

Robert Wood: One of these here. I could recognize anybody coming in the apartment.

Dungan: Which one do you recognize that worked at your brother's cleanup shop?

Robert Wood: I believe I seen him there.

Dungan: 113179?

Robert Wood: Yes, sir.

Dungan: Look through these now. These are snapshots. They're not mug shots. They don't have numbers on them.

Robert Wood: That's the same boy I recognize here.

Dungan: You don't recognize any of them as the ones that came in on the game?

Robert Wood: No, sir.

Lewis: Did you borrow two thousand dollars to continue the game at one time?

Robert Wood: I borrowed a thousand one time.

Dungan: Who did you borrow the thousand from?

Robert Wood: A man at the Casbah Lounge.

Dungan: When was that?

Robert Wood: The second game we played.

Dungan: When did you borrow it from him? The day before? Right before?

Robert Wood: The day we played.

Dungan: The day you played and you borrowed a thousand dollars.

Linville: You were already broke and you went back and got an additional thousand?

Dungan: Then you borrowed eight hundred from your brother, Joe, Monday night, Monday?

Robert Wood: Yes, sir.

Lewis: Who did you borrow it from?

Robert Wood: James Hughes. I've already paid him back.

Dungan: Mr. Wood, how were you dressed that night? Monday night?

Robert Wood: I had on an orange shirt, well light colored shirt and khaki pants.

Dungan: Did you have a hat on?

Robert Wood: No, sir. I never wear a hat.

Dungan: How about your brother, Joe? How was he dressed?

Robert Wood: He had on white pants. I don't remember the color of the shirt.

Dungan: What kind of shirt did he have on?

Robert Wood: I don't remember.

Lewis: What kind of white pants did he have on? Were they white dress pants or white work pants, or what?

Robert Wood: Denims, I believe.

Lewis: White levis?

Robert Wood: Uh, huh.

Dungan: Now, let's go over this Tommy again. What, or how was he dressed?

Robert Wood: He had on a, he had on slacks, I think they were a dark color, gray or brown.

Dungan: What type shirt would you say he had on?

Robert Wood: He had a slip over shirt and it was dark. I don't know exactly what color.

Dungan: How was Mr. Douglas, or Mr. Blaylock as you call him, dressed?

Robert Wood: He had on tight, pretty tight slacks. I believe they were gray. I'm not sure. I don't remember the shirt.

Dungan: When y'all went to get the cards, were you dressed the same as you were when this thing happened?

Mr. Scruggs: Did the three Negroes have on hats, or were they bareheaded?

Robert Wood: I believe they were bare-headed. I'm not sure.

Dungan: Did they have on any kind of mask or glasses?

Robert Wood: I don't think so.

Mr. Scruggs: Stocking over their head or face?

Robert Wood: No, sir.

Dungan: Had y'all been examining any jewelry or, watches, rings, or what-have-you before the game and/or during the game?

Robert Wood: No.

Dungan: Do you recall seeing any in the apartment?

Robert Wood: Naw—the apartment looked like, except for the man and the dog, looked like it wasn't nothing in there except a television set. The bedroom doors were pulled to. I didn't open either one of them.

Lewis: Did anyone come over to borrow anything while the game was going on?

Robert Wood: The second game, a real young boy came and asked for some vanilla. A real young boy, 18 or 19 years old.

Lewis: Who was in there at the time?

Robert Wood: Just me and Ray.

Lewis: Just the two of you?

Robert Wood: Yes, sir.

Lewis: Woppy wasn't there?

Robert Wood: No.

Dungan: Have you ever seen Woppy at the apartment?

Robert Wood: Yeah, he was, he went by there (one of the) one other occasion, and left when we got there.

Mr. Scruggs: Did he come into the apartment?

Robert Wood: If he did, he left immediately after we got there.

Hinds: Did these Negroes have what the Negroes call an Afro, or African haircuts—their hair grows all——

Robert Wood: I didn't see 'em long enough. I was behind that partition. I didn't see 'em long enough to recognize them.

Dungan: Do you recall if they had hair like this? (Hold that right there a minute) (indicating photographs) Or like this? That's what he means by an African haircut.

Robert Wood: I really couldn't tell. I was behind that partition.

Dungan: Mr. Wood, were you smoking that night?

Robert Wood: I don't smoke.

Dungan: You don't smoke. How about your brother?

Robert Wood: I don't believe he does either—sometimes——

Dungan: How about Mr. Douglas? What was he smoking?

Robert Wood: I don't recall.

Lewis: Cigarettes, cigars?

Robert Wood: Cigarettes.

Dungan: How about this fellow Tommy?

Robert Wood: I don't believe he smokes either. I didn't see him smoking cause I wasn't paying any attention to him.

Dungan: Do you recall anybody smoking a cigar that night?

Lewis: He wasn't playing—Tommy wasn't playing?

Robert Wood: No, sir.

Dungan: Nobody, to your knowledge, was smoking a cigar?

Robert Wood: I don't remember anybody smoking a cigar.

Lewis: What was the purpose of two men being there to witness this play?

Robert Wood: I guess—well, my brother came by there with me to bring me some money at the Krystal and went down there with me and, uh——

Linville: You hadn't already lost some money, had you?

Robert Wood: No. I had some money and I called him at work, told him to come over there, that I might need to borrow some money.

Dungan: Were there some more cards there, besides the ones y'all went out and bought?

Robert Wood: I think there was a deck of paper cards from a previous game that we had, that we hadn't opened.

Dungan: Where did they come from? Do you know?

Robert Wood: I don't know.

Dungan: The cards you played with before, where did they come from? Do you know?

Robert Wood: I believe they came from up there at one of those 7-Eleven stores.

Dungan: Who bought them?

Robert Wood: First time we played, he already had some cards there, and the second time we went up and got some.

Dungan: Where? The Seven-Eleven Store?

Robert Wood: Yes, sir.

Linville: I'm assuming that in your opinion, he was cheating.

Robert Wood: I imagine so.

Linville: How?

Robert Wood: I don't know how. I've heard of the man before after he was identified today. I've heard of Douglas before, but I'd never met him and didn't——

Dungan: Where did you hear from him before?

Robert Wood: Well, I'd heard he was in this town a couple of years ago, and played a man——

Dungan: Who did he play on that time?

Robert Wood: He played a man up in Tipton County.

Dungan: Who was that?

Robert Wood: Hagen.

Dungan: Akin?

Robert Wood: Yes, sir.

Lewis: Do you feel like those cards were marked cards?

Robert Wood: Well, I suspected they was. That's the reason I wanted to go with him to get some plastic cards.

Mr. Scruggs: You thought the paper cards were marked cards?

Robert Wood: I suspected they were.

Mr. Scruggs: Any glasses—did he have glasses when he played.

Robert Wood: Rim glasses.

Mr. Scruggs: He did wear rim glasses, when he was playing cards. Did he normally wear glasses when he wasn't playing cards?

Robert Wood: Yes, he had the glasses on while he was watching television too.

Mr. Scruggs: At any time that you met him did he have glasses on?

Robert Wood: Well, he had glasses on most all the time I met, met him.

Dungan: Back when y'all left the apartment to go buy the cards, did he have glasses on?

Dungan: Look at these photographs here. Look close. Do you recall any of them?

Linville: Do you know Woppy?

Robert Wood: I know him by that name. I don't know his real name.

Dungan: Did Douglas call you on this Monday at any time in the day or the night as far as that goes?

Robert Wood: We had an appointment to play that night.

Dungan: You had an appointment—when was this appointment set up?

Robert Wood: From the previous Thursday.

Dungan: From the previous Thursday.

Mr. Scruggs: Was that down at the pool hall where you were contacted—Hershel's?

Robert Wood: We played on Thursday. Yeah, it was.

Mr. Scruggs: He contacted you at Hershel's?

Robert Wood: I played Woppy some pool one night for about forty-five minutes.

Dungan: Well, let me ask you this. Was there ever anything discussed between you and Douglas about bringing your brother over there or anybody else to the game? I think you said on the previous occasion that y'all were the only ones there. How come on this night that there were two other people there? Your brother and this other fellow.

Robert Wood: My brother, he don't gamble hardly any at all. I'd called him at work and he told me he could bring me some money when he closed up.

Lewis: Do you know a fellow by the name of O'Neal?

Robert Wood: I played a man with a different name and I heard his name was O'Neal later.

Dungan: What was the different name you played him by?

Robert Wood: Burt Thompson.

Dungan: Burt Thompson?

Robert Wood: But this was two or three year ago.

Lewis: Did you beat him?

Robert Wood: No.

Dungan: At the time you were playing, did you ever tell Douglas that you were going to bring your brother with you, or did you just bring him there that night?

Robert Wood: I just brought him there that night cause I had called him for him to bring me some money.

Dungan: All right, but you didn't tell Douglas he was coming?

Robert Wood: Yes, sir, that's right, I didn't.

Dungan: Did Douglas object to him being there, you think?

Robert Wood: He said, well—when we showed up, he was watching television, and I done told him I wasn't playing unless we went to get some plastic cards.

Linville: You didn't have a telephone conversation with Douglas in which you mentioned your brother was coming?

Robert Wood: No, sir.

Dungan: At any time during one of these games, did you leave the game and go borrow some money from anybody?

Robert Wood: Yeah. I went and borrowed some money from James Hughes—on one occasion, I forget now whether it was the first or second one.

Dungan: How much did you borrow?

Robert Wood: A thousand dollars.

Dungan: One thousand dollars?

Robert Wood: That's right. I brought it back to him and paid him back.

Dungan: While y'all were playing this last game, did anybody take the dog out for a walk?

Robert Wood: No.

Dungan: Stayed shut up in the apartment the whole time.

Lewis: Monday night, did the dog start barking for someone to let it out to use the bathroom?

Robert Wood: I don't recall it.

Lewis: You don't remember the dog started barking and wanting out and nobody would let it out? Nobody left the apartment for any reason?

Robert Wood: Not that I know of.

Dungan: You didn't go in another apartment or talk to anybody going out the front door of that apartment?

Robert Wood: No, sir. I got to my car as fast as I could.

Linville: Have you ever heard of Titanic Thomas?

Robert Wood: Heard of him—never met 'em.

Linville: Do you know whether he has any relatives in town or not?

Robert Wood: No, but I heard he had a son, but I don't know where he is. I just heard he had a son.

Linville: Was that Titanic Thomas' son that was in the game with you?

Robert Wood: I'm not sure. His name was Tommy is all I know. No one played in the game cept me and the other man.

Dungan: I want you to look through these photographs—— (interrupt)

Robert Wood: No one played in the game cept me and the other man.

Linville: I didn't mean that—I meant Tommy.

Robert Wood: That boy's name Tiller, I think.

Dungan: Do you know which one he is?

Robert Wood: No, just that he's one of the Tiller brothers.

Dungan: Do you have any connection with him in reference to these games?

Robert Wood: He was at the pool room the night I played Whoppy.

Dungan: He was at the pool room when you played Woppy? Look at these photographs and be real specific about who you know in there and name them and where you know them from. Look at that fellow right there. Do you know him?

Robert Wood: No.

Dungan: Don't know him.

Robert Wood: No, sir. This boy looks familiar, but I can't think of the name.

Dungan: Did he have anything to do with this deal? Setting up the game, or——

Robert Wood: No. I think I've seen him before.

Dungan: About that other fellow, before we get to him?

Robert Wood: No, I don't know him.

Dungan: Now this one?

Robert Wood: This is Woppy.

Dungan: This is Woppy, number 113854, is that who you identified as Woppy?

Robert Wood: Yes, sir.

Dungan: Do you know him.

Robert Wood: No. This is Sonny Byrd here.

Dungan: Did he have anything to do with it.

Robert Wood: I don't imagine so. I know this one here.

Dungan: Who's he?

Robert Wood: James Parks from Jackson, Tennessee.

Dungan: Did he have anything to do with this deal?

Robert Wood: No. Now, I've seen this man before. Probably my picture was taken at the same time his was.

Dungan: Did he have anything to do with this?

Robert Wood: No, I haven't seen him in five years—That's Michael.

Dungan: Did he have anything to do with this?

Robert Wood: No.

Dungan: Was Mike at the pool room with his brother——

Robert Wood: No, sir. I believe that's another Tiller boy, but I haven't seen him over once or twice.

Dungan: That's George, there. None of these had anything to do with it?

Robert Wood: That's right.

Lewis: Does your brother, Joe, know Woppy?

Robert Wood: I think the said he knows him by that name, Woppy is all.

Lewis: Where has he seen him?

Robert Wood: Alibi Lounge right across from where his business is, and I guess he's seen him two or three times besides.

Dungan: Let's go back so we can get this here. Number 79194—that's the one you said was Tiller that was at the pool room?

Robert Wood: Right. He was there last week when Woppy was there.

Dungan: When Woppy was there? Is this the first meeting or the second meeting you and Woppy had at the pool room?

Robert Wood: The second time I seen him, there. I've seen Woppy off an on for over a year. I seen him at Tupelo even. I've always known him as just Woppy, never known his name.

Dungan: What was he doing at Tupelo?

Robert Wood: Playing pool. He was playing——

Dungan: Here's some more male coloreds—would you look at them? Look close now, because you might be able to recognize one.

Robert Wood: These are the same ones I done looked at before—and——

Dungan: I don't think so.

Robert Wood: I ain't seen none of them.

Lewis: Do you have a local phone number how we can contact you?

Robert Wood: There's a phone at that apartment where I stay at my girl friend's sometimes.

Mr. Scruggs: You can get in touch with us and we'll have him available at any time you need him.

Dungan: At the time you were in the pool hall with Woppy and this Tiller fellow here, were they conversing or having anything to do with each other? Were they playing pool together?

Robert Wood: I think they was—Woppy was a pool for him and I think Tiller had up half of the money when he was playing Jack Hunter and when he was playing me, too.

Dungan: Did Tiller leave with him?

Robert Wood: They left in the same car together, cause the pool room closed.

Dungan: Well——(interrupt)

Lewis: What kind of car?

Robert Wood: A green Pontiac, I believe. A green Pontiac.

Lewis: Does your brother, Joe, know Tommy?

Robert Wood: Not that I know of.

Lewis: You say your brother, when he was over at the apartment, had on white levis, you don't know the color of the shirt.

Robert Wood: He had on white pants. I don't know whether they were white levis or slacks.

D. O. Lewis: How does he, your brother, wear his hair?

Robert Wood: Most of the time, he's got it cut off fairly short.

Lewis: How does he comb it?

Robert Wood: It ain't hardly long enough to comb.

Lewis: Did he have long sideburns or did he have it styled?

Robert Wood: His hair's not long, but he has it styled sometimes.

Dungan: You were the first one out the door after the shooting?

Robert Wood: As far as I know I was.

Dungan: Who did you see when you got outside?

Robert Wood: I just seen some people.

Lewis: Where was the Negro at that fired the shot.

Robert Wood: Close to the door because——

Lewis: He fired across the room then.

Robert Wood: Yes, sir.

Lewis: Did you hear any bullets strike anything? In the apartment?

Robert Wood: No.

Dungan: Did you see Douglas fall, go down or holler?

Robert Wood: A shot—I don't know if it was in the apartment or not, but it was really loud——

Lewis: Was any furniture turned over?

Robert Wood: Darned if I know. I was excited and just got out as fast as I could.

Dungan: Do you recognize that photograph?

Robert Wood: Yeah, I guess that's him. Somewhat different dress.

Dungan: How about that one—the other one?

Robert Wood: It's not—you can't see it too good but I guess it's the same guy, I'm not sure.

Lewis: Is that the man you were playing cards with?

Robert Wood: I'm certain. Almost positive of it. I'm pretty sure it is. I'm almost positive cause I'm use to seeing him dressed, not with his shirt off.

Dungan: Look at this photograph here. See that shot right there? Do you wear glasses Mr. Wood?

Robert Wood: No.

Dungan: Do you recognize that—did you ever see that before?

Robert Wood: I don't know whether it's a ring, a key ring or what it is.

Dungan: You don't know what it is? Did you know Sherman Dean?

Robert Wood: Yeah.

Dungan: How well do you know Sherman?

Robert Wood: Well, I hadn't seen him in a good long while but I know him.

Dungan: Do you ever gamble with him?

Robert Wood: Yes, sir, I've been at a game or two with him, about two or three year or more.

Dungan: When was the last time you saw him?

Robert Wood: When me and the man 'hes talking about played. O'Neal, Burt Thompson, or whatever his name is.

Lewis: Is he the one that set the game up?

Robert Wood: Yes, sir.

Lewis: Did he set this game up?

Robert Wood: Far as I know he didn't, cause if I even heard his name, I'd go the other way.

Lewis: Dean?

Robert Wood: Yeah.

Lewis: You had no idea who called Douglas in Las Vegas and told him to come down here, that there was a game ready?

Robert Wood: No, sir—well, there wasn't no game ready.

Dungan: When's the last time you saw Sherman Dean?

Robert Wood: I guess, I seen him pass on the street but the last time I seen him close up is when me and O'Neal or Burt Thompson played.

Dungan: In the game?

Robert Wood: Yeah.

Lewis: Did your brother have any guns that you know of? Rifles? Shotguns?

Robert Wood: No.

Lewis: You've never seen him with a gun?

Robert Wood: Well, I've seen him with a little pistol.

Lewis: What kind?

Robert Wood: I guess it was .32 or a .38—but it's been a year or so ago since I seen him with it.

Lewis: You haven't seen him recently with any kind of gun?

Robert Wood: No, sir.

Lewis: Never go hunting?

Robert Wood: Well, I don't think he hunts much—I don't know.

Lewis: He's no hunter?

Robert Wood: No, sir.

Lewis: But you never saw that he had several different calibre shells?

Robert Wood: I haven't never seen any.

Lewis: Have you ever been to Woppy's house?

Robert Wood: No. I've only seen him around different places. I've seen him in Tupelo. I seen in oh, numbers of places.

Lewis: Did he set up the game? Did he tell you a game was in progress?

Robert Wood: He told me they played on Tuesdays and Fridays.

Lewis: That's your first contact with playing cards?

Robert Wood: Yes, sir.

Lewis: On Benbow Drive—With Woppy?

Robert Wood: Yes, sir.

Lewis: Did he write it down on a piece of paper and give it to you?

Robert Wood: No, he told me where—I followed him out there and then he left.

Lewis: Does he know your name?

Robert Wood: No.

Lewis: What kind of car does he drive?

Robert Wood: A maroon Ford.

Lewis: Was he by himself?

Robert Wood: Yes, sir.

Dungan: What car was he in the night you shot pool with him and Tiller was present?

Robert Wood: A green Pontiac.

Dungan: You don't know whose car that was?

Robert Wood: Well, Tiller was driving it.

Dungan: Tiller was driving it. Have you ever seen Woppy with his wife or do you know if he has a wife?

Robert Wood: I've seen him in the pool room with his wife.

Dungan: What does she look like?

Robert Wood: A little dark headed woman wears glasses, had a daughter with 'em. She was asleep on the pool table while he was playing pool.

Dungan: How old is this daughter?

Robert Wood: Four or five years old.

Linville: Whenever y'all were in the apartments, you said the bedroom doors were closed. Did either you, Joe, Tommy or Douglas go in the bedrooms and check to make sure no one was in there?

Robert Wood: Not as far as I know, they didn't. They went to the bathroom and the bedroom doors are in the hall.

Linville: Who's that?

Robert Wood: Everybody used the bathroom on one or two occasions. I used it—I don't think I used it Monday night cause we wasn't there very long but I had used it before.

Linville: Monday night, who all used the bathroom?

Robert Wood: I believe all three of them were in the bathroom on one or two occasions, or just on one occasion.

Linville: How about in the kitchen?

Robert Wood: They went in to take a—mix a drink. The kitchen's real small. I can see in the kitchen from where I was sitting.

Dungan: Well, you could pretty well see down the hall from where you were sitting, couldn't you?

Robert Wood: No, well you can see the first bedroom door. You can't see the second one and you can't see the bathroom.

Mr. Scruggs: Robert, I want to ask you a question. Did you carry a weapon inside that room, any kind.

Robert Wood: No, sir.

Mr. Scruggs: To the best of your knowledge, did your brother, Joe, take a weapon, any kind, either a knife or a gun in the room with him?

Robert Wood: I don't think so—he had on pretty tight britches.

Mr. Scruggs: You do know this dead man, Blaylock, had a pistol on him?

Robert Wood: Yes, sir.

Mr. Scruggs: How far were the Negroes from him when they shot?

Robert Wood: Three to five feet.

Mr. Scruggs: Three to five feet?

Dungan: Did you tell anybody, other than your brother, that you were going to be playing cards for pretty high stakes at that apartment? Prior to Monday night.

Robert Wood: No, sir.

Dungan: How about the man you borrowed money from, previous occasion, did you tell him where you were playing or who you were playing with?

Robert Wood: No. I didn't tell him who I was playing with because I'd told him the man's name was Ray—what he told me.

Dungan: Did you tell the man you borrowed the money from that you were going to be playing poker or playing cards, using the money to gamble with?

Robert Wood: I just told him I'd pay him back either late that night or the next week.

Dungan: You ever borrowed money from him before?

Robert Wood: I think I either borrowed a hundred or two hundred before.

Dungan: But he let you have a thousand on this occasion?

Robert Wood: Well, I been knowing the man well for ten or twelve years.

Dungan: I'm getting at that, but it was a pretty large sum.

Lewis: Was the man you know as Ray wearing glasses when y'all played?

Robert Wood: Yes, sir.

Lewis: Did he wear them all the time? When he met you, or just put them on?

Robert Wood: I wasn't around him that much but what time he was watching television, he had on glasses.

Dungan: You don't recall whether he wore them in the store when you bought the cards?

Robert Wood: No, I don't.

Dungan: Show me where you were sitting. Was the table sitting over here, like this—this is the kitchen, this is the hallway.

Robert Wood: I was sitting over this a way.

Dungan: All right, where were you sitting?

Robert Wood: Now, from the kitchen, I was up—there's a partition back here that doesn't show it, and I was sitting with my back to that partition.

Dungan: Where was Ray sitting?

Robert Wood: With his back to the kitchen. Directly across from me.

Linville: The way that the game was arranged for that day—you said it was previous. You said it was a previous arrangement. And what day was the other game, the game you had just before that?

Robert Wood: Thursday.

Linville: That was on a Thursday? July 2nd, and that's when the arrangements were made?

Robert Wood: Yes, sir.

Lewis: And Joe didn't play Saturday? When were the arrangements made for the game Monday? That's what I was getting at.

Robert Wood: On Thursday, when we played the last time.

Linville: Thursday—the last time you played?

Lewis: You didn't play Saturday or Sunday?

Linville: When did the boy come over to borrow the vanilla?

Robert Wood: I don't really know what day it was. It was a young boy. I remember him coming to the door.

Linville: You said it was the second night you played.

Robert Wood: The second time I was there.

Linville: Is that when the arrangements were made? For the next game?

Robert Wood: Yes, sir.

Linville: That was a Sunday, that was July 5th, 1970.

Robert Wood: When the boy came there for vanilla?

Linville: When the boy came there asking for the vanilla was Sunday, July 5th, 1970, the day before this game.

Robert Wood: I remember a young kid coming——

Linville: Coming and asking for the vanilla. Right?

Robert Wood: Yes, sir.

Linville: Well, that's, that was on Sunday, That's what I'm trying to help you get your dates straight a little bit because they're off right now. This was the night before the fatal game.

Dungan: He played the night before the fatal game?

Linville: Where were you Sunday, July 5th, 1970?

Robert Wood: I was over to the apartment, most of the day, I don't really don't remember—Yeah, I was down at the pool room on Sunday.

Linville: How did Douglas know that your brother was coming to the game?

Robert Wood: He didn't know it, I don't guess.

Linville: He'd told some people that your brother was coming to the game. That's what I meant. You said you didn't get a telephone call from him. This is just a point we're trying to clear up.

Robert Wood: I was thinking it was Thursday when the boy come to the door. He told me to answer the door. I opened the door and there was a boy there who said, "I want a bottle of vanilla." He growled and said, "We ain't got no vanilla," and shut the door in his face, but there was not activity taking place.

Linville: No, there was no activity taking place, but this was Sunday, and that's when the game took place?

Hinds: Were you ever there in a game on Sunday?

Robert Wood: Not that I know of.

Lewis: You weren't there in a game on Sunday?

Robert Wood: No, sir.

Linville: Where did the beer come from? Didn't you say your brother was drinking beer? Where did it come from?

Robert Wood: It was in the refrigerator there.

Lewis: How about the whiskey?

Robert Wood: It was sitting over there on the table, and it was whiskey there everytime I was there——

Lewis: And the beer was there also?

Robert Wood: Yes, sir.

Lewis: But you did not get a telephone conversation from either Douglas or Woppy on Monday?

Robert Wood: Well, Woppy has got a phone number over there at the apartment.

Lewis: At the apartment?

Robert Wood: At the apartment, yeah, but uh.

Lewis: And that's that 332——

Robert Wood: I believe it's 2659.

Lewis: But he didn't call you there? Or you didn't call him. Where was he staying?

Robert Wood: I have no idea.

Lewis: So you couldn't have called him, and if he had called you, that's where it would have been.

Robert Wood: Uh huh.

Lewis: And Woppy had that phone number?

Robert Wood: Woppy had that phone number and I been in that pool room down there a bunch of times and I been knowing Hershel from down at Peoples, ten or fifteen year ago.

Lewis: Well, where were you at Monday. What did you do Monday? Before the game?

Robert Wood: I was at an apartment all day and called my brother and told him I might need some money that night, to meet me. I was at the apartment nearly all day, Monday.

Lewis: Can you recall going anywhere?

Robert Wood: No, didn't go anywhere.

Lewis: Then you couldn't have got a call at the pool hall or some other place?

Robert Wood: Yeah, I called my brother.

Lewis: No, I meant a call about the game. What I'm getting at, they tell us that your brother was coming with you and I just wondered how they knew that he was coming with you.

Robert Wood: I don't know.

Dungan: What was the discussion between you and Woppy on Saturday night, now?

Robert Wood: Nothing. we just played pool.

Dungan: No discussion about the game—not the past game

or the future game? Now, Mr. Wood, tell us about what you told Detective Lewis about the cashier checks.

Robert Wood: ——Five hundred dollar checks. I'm not specific whether it was the first or second play that I—cashed them——

Dungan: One of the previous games? What did you do?

Robert Wood: They were made out to Robert Wood and I signed them on the back and——

Dungan: And gave them to Mr. Douglas, whom you call Ray Blaylock?

Robert Wood: He act like he didn't want to take them, and I said, "Well, the next time I see you, if I've got the money, I'll get them back from you."

Dungan: Did you ever give him the money back? Did he take these checks and put them up, or what did he do with them?

Robert Wood: I have no idea.

Hinds: Tell him what bank you got the cashier's check.

Robert Wood: National Bank of Commerce, N. B. C. in Columbus.

Dungan: N. B. C. in Columbus, Mississippi. Right?

Robert Wood: Right. I got the receipts at my home.

Dungan: You do have the receipts.

Linville: You got any idea what date you got 'em?

Robert Wood: I bought them two or three months ago. The dates I can't remember.

/s/ ROBERT HUGH WOOD

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2. **REDACTED STATEMENT OF ROBERT HUGH WOOD, READ DURING TESTIMONY OF DETECTIVE LEWIS: (Detective Lewis Reading Statement of Robert Hugh Wood)**

"Statement of ROBERT HUGH WOOD, male white, age 35, 124 Air Base, Sub-Division, Columbus, Mississippi, phone area code 601, 434-8435, salesman, made at Central Police Headquarters, Thursday, July 9, 1970, at 1:15 AM to Lieutenant B. N. Linville, Detective J. A. Dungan, Patrolman D. O. Lewis, in the presence of Attorney M. A. Hines, Attorney Harry Scruggs, Jr., and Mr. John Wood. This statement transcribed from tape. Typed by Jeanne Powers. Statement relative to the fatal shooting of WILLIAM DOUGLAS, male white, age 52, alias BILL, on Monday, July 6, 1970, at approximately 9:25 AM in an apartment located at 3403 Benbow Drive, Apartment No. 1, with a small caliber pistol (weapon), by unknown parties. This tape was taken in the presence of his attorneys with the understanding that this was to be a material witness statement and that Robert Hugh Wood was not under arrest. The first part of this tape deals with an understanding between the police officers and the attorneys, as to the type of statement being taken. It was also agreed that a photograph would be made by the police photographer to show witnesses in hopes that it would be necessary to hold show-ups. They did agree for a photograph to be made without Bureau of Identification numbers.

Scruggs: Just for the record, I'd like to get the names of everyone in the room. What's your name, sir?

Lewis: D. O. Lewis.

Dungan: J. A. Dungan.

Linville: B. N. Linville.

Hinds: M. A. Hinds.

John Wood: John Wood.

Scruggs: Mr. Wood?

Robert Wood: Robert Wood.

Linville: Just tell us what happened.

Robert Wood: The night, Monday night, I met blank at the Krystal on Winchester. I'd say ten after seven.

Linville: Okay, Sir.

Robert Wood: We went on down to apartment one, I don't know the number. A man known to me as Ray opened the door to apartment one.

Dungan: Is that apartment one at the Benbow Apartments?

Robert Wood: Yeah.

Linville: A man known to you as Ray?

Robert Wood: He said his name was Ray Blaylock.

Dungan: That's the man that was later killed that night, right?

Robert Wood: Right.

Dungan: Okay.

Robert Wood: He was watching a television program and as soon as that was over about, well, it had to be over at seven thirty, it was Gunsmoke, we went to Lowenstein's East and bought some plastic cards.

Dungan: Who all went to Lowenstein's, Mr. Wood?

Robert Wood: Me and him and blank.

Dungan: Just the three of you?

Linville: Now that was Lowenstein's in Whitehaven, am I correct?

Dungan: Was it the three of you that went to Lowenstein's?

Robert Wood: Well, it was another boy there—I don't know, I know his first name, I don't know——

Dungan: Who was that?

Robert Wood: Tommy.

Dungan: Okay.

Robert Wood: We bought the cards and came back to the apartment.

Hinds: How much did you pay for the cards?

Robert Wood: Four seventy-five.

Dungan: Plastic playing cards?

Robert Wood: Yes, sir.

Dungan: Okay, Sir.

Robert Wood: And, uh——

Hinds: Who paid for the cards?

Robert Wood: Well, we paid five dollars each for 'em.

Dungan: Who handed the clerk the money? Who actually transacted the business there?

Robert Wood: I laid a ten dollar bill on the counter and he gave me a five.

Dungan: I see. Who gave you five—the man that got killed?

Robert Wood: Yes, Sir.

Dungan: Okay.

Robert Wood: We went back to the apartment.

Dungan: Was this Tommy at the apartment when you arrived?

Robert Wood: No, he came in after I did.

Dungan: Before you went to get the cards though?

Robert Wood: Yes, Sir.

Dungan: Okay, go ahead from there.

Robert Wood: We started playing cards, I don't know, 'bout the time it took us to go out there and back, I guess it was five or ten minutes till eight and about, oh, somewhere between nine fifteen and nine thirty.

Lewis: Who all playing cards?

Robert Wood: Me and one man.

Dungan: The one you knew as Blaylock?

Robert Wood: Yes, Sir.

Dungan: What happened about nine fifteen? Or whatever you said?

Hinds: Before that—how much money was on the table?

Robert Wood: Approximately twenty-five hundred dollars.

Dungan: That money was your's?

Robert Wood: I had eighteen hundred dollars involved.

Dungan: All right—that was your part, eighteen hundred dollars involved in the game. Right? Get on to what happened at this time, you say about nine fifteen or nine thirty.

Robert Wood: About two or three loud kicks and the door came in——

Dungan: Which door was that?

Robert Wood: The front door.

Dungan: All right, what happened then?

Robert Wood: Ray jumped up and I guess he was reaching for a gun. I didn't see it but I——

Linville: Didn't you tell me this morning you thought he had the gun on him?

Robert Wood: I said he had a .38 on him. I'm sure he had a .38 on him.

Linville: And he jumped and then what?

Robert Wood: There were some shots fired—they were all in the apartment. I was sitting next to the wall and he was sitting back to the kitchen and I was behind the partition there and the shots were fired. They didn't—I don't know whether they seen me or not. I got out the door. The door was kicked open and left open.

Dungan: Who are you talking about they?

Robert Wood: When the door was kicked open, I seen two or three others and shot by——

Linville: You told me three.

Robert Wood: I think it was three. Had a shotgun——

Linville: One had a shotgun.

Robert Wood: And two pistols.

Dungan: Each one had a pistol and one had a shotgun—what you believe to be a shotgun.

Robert Wood: I think it was a sawed off shotgun. I'm not sure.

Dungan: Who fired the shots? Did the—Ray——

Robert Wood: I'm not sure of some of it. Sounds like two shots fired and I was behind the partition.

Dungan: Which partition are you talking about, Mr. Wood?

Robert Wood: Right inside the front door—it's a little partition——

Dungan: To the left as you walk in the door?

Robert Wood: Yes, sir.

Dungan: And you were sitting with your back to the wall which I believe would be the west wall, is that correct?

Robert Wood: Yes, sir.

Dungan: All right. After the shots were fired what happened?

Robert Wood: I got out the door that was kicked open, left open and I got to my car which was behind the apartment.

Dungan: Behind the apartment. Parking area parked behind there?

Robert Wood: Well, it was on the west, now, east side a little bit behind the driveway.

Dungan: In the indented place that comes out there?

Robert Wood: Yeah.

Dungan: Did you see Ray pull his gun out?

Robert Wood: Just seen him jumping up and reaching for it. I don't know whether Ray ever got it out or not.

Dungan: Who all was in the apartment when the others came in?

Robert Wood: Me, this boy known as Tommy, blank and him.

Dungan: All right, you ran straight out the front door and which way did you go around the apartment?

Robert Wood: I went out the front door and around to the east, to my car.

Dungan: You went around toward the driveway on the east side of the apartment and went straight to your car?

Robert Wood: To my car.

Dungan: What kind of car do you drive, Mr. Wood?

Robert Wood: A 1967 Plymouth.

Dungan: What color is it?

Robert Wood: Blue.

Dungan: Solid blue?

Robert Wood: Yes, sir.

Dungan: Which way did you leave?

Robert Wood: Off——

Dungan: You know where I understand you were parked, you could either go around the circle and go out the west side or——

Robert Wood: I came straight out on the east side of the building.

Dungan: In other words, you pulled out, backed up apparently or however you parked?

Robert Wood: Yes, sir.

Dungan: And went back down the east side, right?

Robert Wood: I backed up and came out the east side.

Dungan: Did blank go directly to the car with you or did he meet you out there?

Robert Wood: Well, he met me out there. I run in the shooting. I wasn't looking anywhere, just getting loose from all the shooting.

Dungan: What happened to the fellow Tommy?

Robert Wood: I don't know, sir.

Dungan: Did you see Mr.—I'm going to call him Douglas from now on—you call him Blaylock. You understand we are referring to Blaylock, Douglas be the one you refer to as Blaylock. Did you see what happened to Blaylock or Douglas after the shots were fired? Did you see him fall? Did you know he was hit?

Robert Wood: I heard some shots and apparently two—I don't know—I didn't know—I didn't see him hit or didn't know who was hit, didn't know whether it was his shot or whose shot it was.

Dungan: All right. Now this fellow Tommy, will you describe him to me?

Robert Wood: About thirty years old——

Dungan: He is a white man isn't he?

Robert Wood: Right, yes, sir.

Dungan: How tall is he?

Robert Wood: Close to six feet.

Dungan: What kind of build has he got compared to yourself? Stocky, slim?

Robert Wood: Oh, he's not quite as heavy as I am, I don't guess. Probably 170 to 180 pounds.

Dungan: What kind of looking hair has he got?

Robert Wood: He's got—his hair's longer than mine—it ain't real long.

Dungan: Is it combed back, kind of like yours? Is his hair line as far back as yours?

Robert Wood: No, he's got a lot more hair than I've got.

Dungan: Is it the color yours? Darker like mine or like Mr. Scruggs here?

Robert Wood: I'd say it's about the color of yours.

Dungan: What kind of clothes did Tommy have on?

Robert Wood: Well, he was wearing tight britches and I couldn't even——

Dungan: What do you mean tight britches?

Robert Wood: I don't know.

Dungan: New kind?

Robert Wood: Yes.

Dungan: Do you remember what color they were?

Robert Wood: Grayish:

Dungan: How about his shirt? What type? Did he have a tie and shirt on or over shirt or what?

Robert Wood: He had one of those slip over shirts on.

Dungan: Was it dark or light colored?

Robert Wood: It was darker than his pants, I guess, like this.

Dungan: Do you know how Tommy got to the apartment?

Robert Wood: No, I don't. I didn't see a car. He got there right after we did.

Dungan: You don't know how he came?

Robert Wood: No, sir.

Dungan: You don't know how he left and you didn't see him leave?

Robert Wood: I didn't see him leave.

Dungan: Did he leave out of the apartment ahead of ya'll or——

Robert Wood: I really don't know. I don't know whether he was ahead of us or behind us.

Dungan: Alright, before we get to these others——

Robert Wood: I seen in the paper that the description of——

Linville: Don't believe anything you read in the paper——

Robert Wood: The description fits him, that said, "Call the police" and the boy turned around and disappeared, the one about 180 or 190 pounds.

Dungan: Okay, let me ask you this. Before we get to the others and what they look like, so we can get a good background on it, you were seated with your back to the wall at the time, is that right?

Robert Wood: Well, my back was to the partition, it wasn't to the wall.

Dungan: To the partition, just to the left of the front door?

Robert Wood: Right.

Dungan: Okay, now where was Douglas or Blaylock as you call him?

Robert Wood: Straight across from me, his back was to the kitchen.

Dungan: To the kitchen door, right?

Robert Wood: Yes, sir.

Dungan: Where was the fellow Tommy?

Robert Wood: Well, I think—I believe—I forgot which way it was arranged. One of 'em was in a chair and the other one was on the couch.

Dungan: Okay, one in a chair and one on a couch, right?

Lewis: Did you see a dog?

Robert Wood: Yes, sir, there was a little dog there.

Dungan: There was a dog in the apartment? What kind of looking dog was it?

Robert Wood: A little small, guess it was a Chihuahua.

Dungan: After ya'll came back with the cards, you went to Lowenstein's you said, I believe on 51 South, the four of you came back together. Whose car did you go down there in?

Robert Wood: Mine.

Dungan: Your car. Alright, you got the cards and came straight back to the apartment. Where did you park it? You parked where you got in it, right?

Robert Wood: Right, yes, sir.

Dungan: You didn't move it any time?

Robert Wood: No, sir.

Dungan: Did all of you go into the apartment together?

Robert Wood: Yes, sir.

Dungan: Did anybody leave the apartment before the others kicked the door open?

Robert Wood: No, not that I know of.

Dungan: You, Tommy, you or Mr. Douglas or blank or Tommy didn't leave?

Robert Wood: No, sir.

Dugan: Is this Tommy a local fellow?

Robert Wood: I really don't know.

Dungan: Have you ever seen him before?

Robert Wood: I have seen him a couple of times.

Dungan: Where did you see him?

Robert Wood: I seen him at the Hershel's Pool Room on Madison.

Dungan: Alright, anywhere else?

Robert Wood: No.

Dungan: If you wanted to get in touch with him, would you know how? Would you know somebody to go to that mutually knows him and could get in touch with him?

Robert Wood: Well, not exactly, I don't know his name other than Tommy.

Dungan: Anywhere we could go and ask somebody and say we want to talk to Tommy or you want to contact him, could you do so?

Robert Wood: I don't think so.

Lewis: Whose apartment was it? Whose apartment?

Robert Wood: Well, the man told me that we have regular ring around games here all the time, but the man at the apartment—I never did see him.

Dungan: In other words, you don't know the owner of the apartment, the man that occupies it?

Robert Wood: He never was there. I don't know.

Dungan: How many times you been in the apartment before that night?

Robert Wood: Two times before.

Dungan: When was that?

Robert Wood: Thursday, the week before and on Friday, the week before that.

Dungan: Thursday the week before?

Robert Wood: The Thursday before Monday and then the previous Friday to that.

Lewis: You mean the Friday before the Thursday?

Robert Wood: Uh huh.

Lewis: Three weeks ago?

Robert Wood: Uh huh. Be three weeks this coming Friday.

Dungan: Did ya'll have a game then?

Robert Wood: I was told there was going to be a regular game there and I showed up, but——

Scruggs: Well, tell him how you knew there was going to be a game there.

Robert Wood: The man I seen at the Southern Frontier.

Scruggs: That's at Bellevue and Madison.

Dungan: Now, let me get back—you were there the previous Friday before and then the Thursday, I'm sorry, the Thursday before Monday night and the previous Friday before that Thursday. In other words, it's been about two weeks, not quite two weeks. Alright, now, how did you come about going to that apartment to start with the first time?

Robert Wood: A man I seen around town several times, I don't know his name, at the Southern Frontier, said they had a game there on Tuesdays and Fridays.

Hinds: Now when did you see him at the Southern Frontier?

Robert Wood: Well, it was on Friday. He told me about it on Wednesday before the Friday, be two weeks, be three weeks ago yesterday, I guess.

Dungan: Let's go a little further. Let's get these dates straight now. It happened on the 6th and you were over there Thursday, July 2nd, 1970. Alright, before that—let's go back to June. Now, when did you meet this guy at the Southern Frontier in reference to that Friday, June 26, 1970?

Robert Wood: It was on a Wednesday.

Dungan: Was it Wednesday night or in the day time?

Robert Wood: Wednesday night.

Dungan: Alright, that'd be on the 24th then, Wednesday, June 24, 1970.

Hinds: What time did you meet him?

Scruggs: What time of day?

Robert Wood: I was—between ten and eleven o'clock.

Scruggs: Day or night?

Robert Wood: Night.

Dungan: Were you by yourself when you met him or were you——

Robert Wood: I was by myself.

Dungan: Alright, you've seen him around town. How did yall get together at the Southern Frontier?

Robert Wood: Well, I guess, I've seen him in several lounges and pool rooms on one or two occasions.

Dungan: Okay. Did you just meet him in there or did you all sit down and have a beer and drink beer together or just what?

Robert Wood: Well, he came over to the table where I was at and started telling me about the poker game.

Dungan: He approached you and started telling you about a poker game. What poker game?

Hinds: Exactly tell him what he told you.

Robert Wood: That there was a poker game out on Winchester every Tuesday and Friday.

Dungan: On Tuesday and Friday. Okay.

Robert Wood: Yes, sir.

Scruggs: Did he give you the address?

Robert Wood: Yes, sir.

Dungan: The address where it happened, right? He gave you the actual address, right?

Robert Wood: Yes, sir.

Dungan: Did he ask you if you'd be interested in playing or what? What happened after that?

Robert Wood: Well, he asked me if I'd be interested in playing and I said yes.

Dungan: Did he tell you anything about the size of the game?

Robert Wood: No, he said it was a pot limit game, played on Tuesdays.

Dungan: What's the limit or what?

Lewis: What did you call this man? Did you know him by name?

Robert Wood: I heard his nickname.

Lewis: What's that?

Robert Wood: Woppy. I don't know his name.

Dungan: Woppy?

Robert Wood: Woppy.

Dungan: Okay, Woppy. Now he told you it was a pot limit game and he told you it was pot limit game and asked you if you wanted to play? Did he invite you over to play?

Robert Wood: Well, he said there was going to be a game Friday, said they were going to play that Friday.

Dungan: Said there was going to be a game that Friday, but there was usually one there Tuesday or Thursday?

Robert Wood: Tuesdays and Fridays.

Hinds: Did he tell you who run the game?

Robert Wood: No, he didn't, sir.

Dungan: He invited you over there particular night and you went over there?

Robert Wood: Yes, sir.

Dungan: Alright, what happened that Friday night over there?

Robert Wood: Well, this guy, Ray, opened the door and he was watching television at the time. Wasn't nobody else there.

Dungan: He was alone, right?

Robert Wood: Yes.

Dungan: Okay, did you go in the apartment?

Robert Wood: I went in the apartment.

Lewis: Did you know him previously?

Robert Wood: No, sir.

Lewis: This is the first time you made contact with this man?

Robert Wood: Yes, sir.

Dungan: Did you, did he introduce himself to you? He introduced himself as Ray Blaylock, right?

Robert Wood: Yes, sir.

Dungan: How long did ya'll stay that night? Did ya'll have a game between yourselves?

Robert Wood: Yeah, he said he expected some people at any time and we started playing some Rummy at the table.

Dungan: Alright, did anybody else ever come?

Robert Wood: Nobody ever came. I left. I went over about a quarter till seven and left about eleven o'clock.

Lewis: Did you win or lose?

Robert Wood: I lost. There was twelve hundred and something dollars the first time.

Lewis: Was this all in Rummy?

Robert Wood: Yes, sir.

Dungan: And, he was the only one there throughout the game, right? Was the do there that time?

Robert Wood: Yes, sir.

Dungan: Nobody came or went from the apartment, right?

Lewis: You went by yourself in your car?

Dungan: Same car?

Robert Wood: Yes, sir, '67 Plymouth.

Dungan: Then after that game, did you have any more contact with Woppy?

Robert Wood: Nothing about the game. I seen him downtown after that.

Dungan: Alright, when was that?

Robert Wood: Saturday night. I played pool with him in fact.

Dungan: That would be the next night after the night you played Rummy with him?

Robert Wood: No.

Dungan: It was the night of the 26th you played Rummy—the 27th would be Saturday, right?

Robert Wood: No, I went back home to Columbus following this game and I came back to town and I played pool with Woppy Saturday night, this past Saturday night.

Lewis: Was Tommy there?

Robert Wood: No.

Dungan: Alright, that's on the 4th. I understand you said ya'll played twice before on July 2nd, 1970. You played Friday night and you said something about Thursday.

Robert Wood: Thursday.

Dungan: Thursday would be the second?

Robert Wood: Yes, sir.

Dungan: Did you go back to the apartment where you played the Rummy?

Robert Wood: Yes, Sir.

Dungan: What caused you to go back on that Thursday night? Did you contact somebody or did they contact you?

Robert Wood: He called up at the pool room while I was up there—and—uh——

Dungan: Who called up there?

Robert Wood: This Ray—it would have been Douglas.

Dungan: When did he call? What day was that on? To set this game up on Thursday night?

Robert Wood: On Thursday afternoon, asked me did I want to play any more.

Linville: Were there any women present?

Robert Wood: No.

Dungan: Alright, then you went over there on Thursday night which would be the 2nd, right?

Robert Wood: Right.

Dungan: Who was there that time?

Robert Wood: Just him.

Dungan: What time did you go over there that night?

Robert Wood: About seven o'clock.

Dungan: How long did you stay?

Robert Wood: Till between eleven and twelve—I don't know exactly.

Dungan: Okay, what did you play that night?

Robert Wood: We played poker.

Dungan: Poker? Just you and him, right?

Robert Wood: Right.

Dungan: What kind of cards did you use?

Robert Wood: I used paper cards then.

Lewis: What kind of poker did ya'll play?

Robert Wood: Low ball.

Dungan: Alright, how much did you win or lose that night or what happened?

Robert Wood: I lost a little over two thousand dollars.

Dungan: Lost two thousand that night? In other words, he was in to you for about thirty-two hundred dollars, that night, at this point, right?

Robert Wood: Right.

Dungan: Okay, did anybody come in and out during the game?

Robert Wood: No.

Lewis: You were by yourself when you went over there?

Robert Wood: Yes, Sir, I was by myself.

Lewis: Same car?

Robert Wood: Yes, Sir.

Dungan: Did he get any phone calls while you were there?

Robert Wood: As far as I know there wasn't no phone in the apartment.

Dungan: Okay, do you know where he called you from to get you to come over there?

Robert Wood: No, Sir.

Dungan: When you left that night you were in your own car that night, right, the same Plymouth?

Robert Wood: That's right.

Dungan: That's getting us on through the second. You say you met Woppy at the pool hall on the 4th, is that right?

Robert Wood: Let's see, Saturday was the 4th. Yes, I believe it was Saturday night when I played.

Dungan: Alright, what lead up to you going back the 6th, Monday night?

Robert Wood: Well, I play quite a bit of cards and I just figured I'd had a chance and I just knew there was a lot of smart people in this world. I suggested going and getting the plastic cards.

Dungan: Well, now, who contacted you to come over there on Monday night? What I'm getting at is how did you come about going Monday night, the 6th? In other words, you saw Woppy before?

Robert Wood: Yeah. Well, on Thursday when I played him, I told him I'd play him some more.

Dungan: You told Blaylock you'd play him some more?

Robert Wood: Yes, Sir. I told him I'd play him some more if we used plastic cards and set 'em down on the table and dealt from the table.

Lewis: What was the reason for that?

Robert Wood: Well, I suspected him—maybe a little sharper than I was.

Dungan: Let me get at this. I may not be getting the point or may not understand, but Monday, did you just go over there on your own? They contact you?

Robert Wood: No, on Thursday when I played him I told him I'd play him some more on Monday.

Dungan: Did they call you or make arrangements or anything?

Robert Wood: I just told him I'd meet him over there around seven thirty.

Dungan: You told him you'd meet him there Monday at 7:30 PM at night, Monday.

Lewis: You didn't talk to him anytime Monday, other than when you arrived at the apartment, is that right?

Robert Wood: That's right.

Dungan: You'd already made previous arrangements to play a game with him Monday night, provided you used plastic cards and not the paper cards.

Lewis: Did he ever contact you by phone?

Robert Wood: No, sir.

Lewis: He never called you?

Robert Wood: No. He called me up at the pool room.

Lewis: Hershel's? When?

Robert Wood: Uh, for, for a second game he called up there. I was there on—he asked me did I want to play some more.

Lewis: How did he know you were going to be there?

Robert Wood: Well, he didn't know, I guess. I went in there about three o'clock, been in there bout I guess six or seven times.

Hinds: I mean did he know you went there previously?

Robert Wood: Well, yeah, after the game there.

Dungan: Then he called you up there the second time, he didn't contact you anytime after that by telephone?

Robert Wood: He didn't—I didn't—there wasn't no phone at the apartment. He never, he didn't—I didn't know where he was staying or anything. I didn't know if there was a phone in the apartment.

Linville: Who was to get a cut out of this game for setting it up?

Robert Wood: Well, they were suppose to cut the pot if it'd been a ring around game, but since we were playing nobody didn't cut in on it. We just played.

Lewis: Nobody was suppose to be given anything? Nobody he contacted and said I've got a game set up and I'll give you a certain percentage of the winnings?

Robert Wood: Not in that apartment. I don't know who was suppose to get any percentage of it. As far as cutting the pot—the pot wasn't cut cause there was just two of us playing.

Dungan: Okay, by pre-arrangement you and blank went over there Monday night in your car.

Robert Wood: I called blank Monday afternoon because I was a little short of money—for him, I was going to borrow some money from him was the reason he was there.

Dungan: How much did you borrow from blank?

Robert Wood: Eight hundred dollars.

Dungan: Is that the reason he decided to go to the game with you?

Robert Wood: He brought the money and met me at the Krystal.

Hinds: Where did you meet him?

Robert Wood: At the Krystal.

Hinds: Did he leave his car there?

Robert Wood: Yes, Sir.

Lewis: What kind of car did he leave there?

Robert Wood: I really don't know. It was a blue car, but he runs a clean-up shop on Summer and he drives different cars all the time and he come and got in the car with me and went on down there. I was waiting inside the Krystal. He showed up—went on and drove in.

Lewis: Hold it. Now, go ahead.

Robert Wood: I was inside the Krystal and he drove up and

I seen him pull in and I just went out and he got out and came and got in the car with me. He didn't go inside.

Lewis: Do you know what kind of car he was in?

Robert Wood: He was in a blue, I think it was a Chevrolet, but I'm not sure. In a blue car.

Dungan: Okay, ya'll went straight on to the game?

Robert Wood: Yes, sir.

Hinds: Did you take him back to his car?

Robert Wood: I took him, I took him back and he got out.

Dungan: This was after the shooting?

Robert Wood: Yes, sir.

Lewis: What time was that?

Robert Wood: Nine thirty, nine thirty-five or something like that.

Dungan: This was immediately after the shooting. You didn't go anywhere else and then come back later?

Robert Wood: No, I didn't.

Dungan: Where did you go after you took him back to his car?

Robert Wood: I just drove around for several hours and went by his shop the next day and went back to Mississippi.

Dungan: Where did you stay that night?

Robert Wood: I didn't stay anywhere. I just drove around.

Dungan: Drove around all night.

Robert Wood: Yes, sir.

Lewis: Do you know anything that, I mean, do you know anyone that lives out in that area?

Robert Wood: On Winchester? Not real close there, no.

Dungan: Alright, let's get back to the poker game now. You said you, I think you said they were eighteen hundred dollars in to you—you had eighteen hundred dollars in the game.

Robert Wood: Well, that was on the table. I wasn't much loser, I——

Dungan: Did you pick the money and take it with you or——

Robert Wood: No, sir.

Dungan: When the fellow started kicking the door, you didn't grab your money up?

Robert Wood: I didn't have time.

Dungan: Who did grab the money up?

Robert Wood: I didn't see anything. When I left there it was still on the table.

Dungan: You backed behind the partition, right?

Robert Wood: Yes, sir.

Dungan: Well, surely you would have been able to see the table from where——

Robert Wood: I could see the table but when I left there the money was still on the table.

Dungan: Well, when these guys started kicking the door, what was yaall's immediate reaction?

Robert Wood: Well, it scared us all, I think, we both know what it was and I jumped up and stood against the partition and he was jumping up from the table and was reaching——

Dungan: What do you mean you think he was going for a gun?

Robert Wood: Well, he was reaching for his pocket. I never did see him get the gun out cause I heard a shot.

Lewis: You know he had a gun?

Robert Wood: Well, he had on britches where you could see it in his pocket.

Scruggs: Was it a revolver or an automatic?

Robert Wood: It looked like a .38 revolver.

Scruggs: Stuck down—bulging out of his pocket?

Robert Wood: Yes, sir, he had on——

Scruggs: With the butt of the pistol sticking out where you could see it?

Robert Wood: Yes, sir.

Scruggs: The grips on the pistol where you could see 'em?

Dungan: In other words, you know he had a pistol. You're saying that, right?

Robert Wood: Yes, sir.

Hinds: How much money would you estimate, total, was lying on the table?

Robert Wood: Approximately twenty-five hundred dollars.

Hinds: Could have been more?

Robert Wood: It could have been four or five hundred more.

Lewis: Were ya'll playing table stakes?

Robert Wood: Yes, sir.

Dungan: Were you winning or losing at this point?

Robert Wood: Well, I'm ahead, we'd been playing about an hour and I was very little beaten, about two or three hundred at least.

Dungan: In other words you were fairing better than you had before, right, with the plastic cards, not the paper cards?

Robert Wood: Right. We went to Lowenstein's and got them.

Lewis: Were there any words said when they first kicked the door open and came in?

Robert Wood: No, sir.

Lewis: They didn't say a word? Who came in?

Robert Wood: Three others.

Lewis: Did they come inside?

Robert Wood: Yes.

Lewis: How did you get by them when you ran out the door?

Robert Wood: They were inside and I'm around that partition and out the door. It was wide open.

Lewis: You're saying there wasn't any other person that came in with them?

Robert Wood: I didn't see any other person involved except the ones involved in the poker game.

Lewis: That's what I thought you were saying. As far as you know there wasn't any other person involved in the robbery?

Robert Wood: The only other person other than the ones that busted in the door I seen was the ones I saw inside the apartment.

Dungan: You heard the kicking on the door. You got up, back up against the partition and Blaylock or Douglas stood up where he was standing. You saw him going for his pocket?

Robert Wood: Yes, sir.

Dungan: Then what happened?

Robert Wood: The shots were fired.

Dungan: How many shots?

Robert Wood: I heard two shots before I got away.

Lewis: Were they the same sounding shots?

Robert Wood: Well, I couldn't tell. I was so scared I couldn't tell one shot from another except it wasn't a shotgun.

Lewis: Did it sound like it came from the same pistol? Or were they different sounding caliber shots?

Robert Wood: I couldn't tell. Loud noises.

Dungan: Let's describe these three fellows you saw come in the door.

Robert Wood: All I seen was—the—kicked the door in and all of 'em rushed in together.

Dungan: The front door?

Robert Wood: Yes, sir.

Dungan: Alright, did they come up to the table where you were or did they go in the living room or did they go back in the kitchen or where?

Robert Wood: After the shots, two of them run by there and I jumped out the door.

Dungan: Two of them run by where now?

Robert Wood: Down that hallway—the doors to both bedrooms was closed and stayed closed all the time I was there. Two of 'em ran down the hall.

Dungan: Where did the other one stay?

Robert Wood: I didn't see him. I got out the door, getting out as fast as I could.

Dungan: Did all three of them come by you where you could get out or did one stand in the door or what?

Robert Wood: They were all by me cause I didn't see anybody when I left there.

Lewis: Did they ever point the pistol or say anything to you?

Robert Wood: Wasn't a word said.

Lewis: Kicked the door in and started shooting?

Robert Wood: Well, probably wouldn't have started shooting, I figure they seen him reaching for a gun—he probably had it in his hand by that time.

Lewis: Was he wearing any jewelry?

Robert Wood: Nothing but a watch.

Lewis: No ring?

Robert Wood: No, sir.

Dungan: You didn't see what they did around the table or who got the money? You didn't get the money? Blank didn't get the money to your knowledge?

Robert Wood: No, sir.

Dungan: How about this other fellow—was he diving for the money?

Robert Wood: I didn't see him after that.

Dungan: You didn't even see blank as I understand it?

Robert Wood: No, sir.

Dungan: Until you got to the car?

Robert Wood: He was at the car, right behind me.

Lewis: Behind you?

Robert Wood: Behind me. My car was locked and by the time I got it unlocked he was on the other side. I just said let's get out of here.

Lewis: You said, 'Let's get the hell out of here'?

Robert Wood: No. I was at my car. I just unlocked the door.

Lewis: I understood Mr. Scruggs to say, 'Let's get the hell

out of here' and I thought that's what you had told him. I was just asking.

Robert Wood: I wasn't wasting no time talking—I was moving.

Lewis: Which ones were armed?

Robert Wood: All three of them were armed.

Lewis: What did the taller one have?

Robert Wood: I don't recall. I just heard a shot and got out of there in a hurry cause the door was wide open.

Dungan: Was he slim build, fat or skinny or what?

Robert Wood: Well, I think the tall one was about my size—the other two were——

Dungan: What would you call yourself, heavy, medium heavy?

Robert Wood: Heavy. I weigh a little over two hundred.

Scruggs: What kind of clothes that tall man have on?

Robert Wood: I really don't know what kind of clothes he had on.

Dungan: Can you say whether they had on suits and ties, overalls, levis or——

Robert Wood: No, no, they had on older clothes. They didn't have regular overalls on, I think they just had, well, it happened so fast I can't describe 'em.

Lewis: Were they loudly dressed? Flashly?

Robert Wood: No, sir.

Dungan: Did they have on bell-bottom—clothes like that—high pocket pants or just average clothes or what?

Robert Wood: Just average clothes. They wasn't no fancy clothes.

Lewis: You said you saw one of them with a shotgun. Do you know which one you saw with a shotgun?

Robert Wood: It wasn't the tallest guy—he had a pistol.

Dungan: What kind of looking pistol did he have?

Scruggs: Was it blue steel, nickel plated or what?

Robert Wood: I couldn't tell.

Lewis: Automatic or revolver?

Robert Wood: There's no way I can tell. I don't know.

Dungan: Can you identify them? If you saw them again would you recognize them?

Robert Wood: I doubt it cause I——

Lewis: Is there any explanation about that?

Robert Wood: The best I know—he kept 'em there to keep people from busting in.

Lewis: Was there any discussion about it?

Robert Wood: Wasn't no discussion—the front door didn't have the same bar across it. It had a two by four that he braced up on each—up underneath it.

Lewis: Was that up there at the time the door was kicked?

Robert Wood: Yes, sir.

Mr. Scruggs: The brace was on the door at the time it was kicked?

Robert Wood: Well, it was across it. I don't know if it was braced up or not.

Dungan: Alright, let me ask you this. When you went out the front door, who was outside the apartment?

Robert Wood: I seen some people there, but I was moving so fast I——

Dungan: Where did you see them?

Robert Wood: In the doorways.

Dungan: Of what?

Robert Wood: I can't recall. I didn't stop to look at anybody. I just run but I did see some people out there.

Dungan: How about on the parking lot?

Robert Wood: I didn't see anybody at the parking lot. When I got to my car—the time I got to my car—the time I got the door unlocked blank was standing at the door. I'd done got in and he was standing at the door the time I got in.

Lewis: Did you have a gun?

Robert Wood: No, Sir.

Lewis: The only one you know was armed was Douglas?

Robert Wood: Yes, Sir.

Dungan: Mr. Wood, look at these photographs here. We have some snapshots and also I'll let you look at the mug shots. Concentrate on them carefully and your memory may bring back to you what they looked like and you may recognize some of them. Look very closely. Take your time with them. You don't recognize any of them as the ones that came in on the game?

Robert Wood: No, Sir.

Lewis: Did you borrow two thousand dollars to continue the game at one time?

Robert Wood: I borrowed a thousand one time.

Dungan: Who did you borrow the thousand from?

Robert Wood: A man at the Casbah Lounge.

Dungan: When was that?

Robert Wood: The second game we played.

Dungan: When did you borrow it from him, the day before, right before?

Robert Wood: The day we played.

Dungan: The day you played and you borrowed a thousand dollars.

Linville: You were already broke and you went back and got an additional thousand?

Dungan: Then you borrowed eight hundred from blank Monday night, Monday?

Robert Wood: Yes, Sir.

Lewis: Who did you borrow it from?

Robert Wood: James Hughes. I've already paid him back.

Dungan: Mr. Wood, how were you dressed that night, Monday night?

Robert Wood: I had on an orange shirt, well, light colored shirt and khaki pants.

Dungan: Did you have a hat on?

Robert Wood: No, Sir. I never wear a hat.

Dungan: How about blank? How was he dressed?

Robert Wood: He had on white pants. I don't remember the color of the shirt.

Dungan: What kind of shirt did he have on?

Robert Wood: I don't remember.

Lewis: What kind of white pants did he have on? Were they white dress pants or white work pants or what?

Robert Wood: Denims, I believe.

Lewis: White levis?

Robert Wood: Uh, huh.

Dungan: Now, let's go over this Tommy again. What or how was he dressed?

Robert Wood: He had on a, he had on slacks, I think they were a dark color, gray or brown.

Dungan: What type shirt would you say he had on?

Robert Wood: He had a slip over shirt and it was dark. I don't know exactly what color.

Dungan: How was Mr. Douglas or Mr. Blaylock as you call him dressed?

Robert Wood: He had on tight, pretty tight slacks. I believe they were gray. I'm not sure. I don't remember the shirt.

Dungan: When ya'll went to get the cards were you dressed the same as you were when this thing happened?

Scruggs: Did the three others have on hats or were they bareheaded?

Robert Wood: I believe they were bareheaded. I'm not sure.

Dungan: Did they have on any kind of mask or glasses?

Robert Wood: I don't think so.

Scruggs: Stocking over their head or face?

Robert Wood: No, Sir.

Dungan: Had ya'll been examining any jewelry or watches, rings or what-have-you before the game and/or during the game?

Robert Hood: No.

Dungan: Do you recall seeing any in the apartment?

Robert Wood: Naw—the apartment looked like, except for the man and the dog, looked like it wasn't nothing in there except a television set. The bedroom doors were pulled to. I don't open either one of them.

Lewis: Did anyone come over to borrow anything while the game was going on?

Robert Wood: The second game a real young boy came and asked for some vanilla. A real young boy, 18 or 19 years old.

Lewis: Who was in there at the time?

Robert Wood: Just me and Ray.

Lewis: Just the two of you?

Robert Wood: Yes, sir.

Lewis: Woppy wasn't there?

Robert Wood: No.

Dungan: Have you ever seen Woppy at the apartment?

Robert Wood: Yeah, he was—he went by there on one of the other occasions and left when we got there.

Scruggs: Did he come into the apartment?

Robert Wood: If he did he left immediately after we got there.

Dungan: Mr. Wood, were you smoking that night?

Robert Wood: I don't smoke.

Dungan: You don't smoke. How about Mr. Douglas, what was he smoking?

Robert Wood: I don't recall.

Lewis: Cigarettes, cigars?

Robert Wood: Cigarettes.

Dungan: How about this fellow Tommy?

Robert Wood: I don't believe he smokes either. I didn't see him smoking cause I wasn't paying any attention to him.

Dungan: Do you recall anybody smoking a cigar that night?

Lewis: He wasn't playing—Tommy wasn't playing?

Robert Wood: No, sir.

Dungan: Nobody to your knowledge was smoking a cigar?

Robert Wood: I don't remember anybody smoking a cigar.

Lewis: What was the purpose of two men being there to witness this play?

Robert Wood: I guess—well, blank came by there with me to bring me some money at the Krystal and went down there with me and uh——

Linville: You hadn't already lost some money, had you?

Robert Wood: No. I had some money and I called him at work, told him to come over there that I might need to borrow some money.

Dungan: Were there some more cards there besides the ones ya'll went out and bought?

Robert Wood: I think there was a deck of paper cards from a previous game that we had, that we hadn't opened.

Dungan: Where did they come from, do you know?

Robert Wood: I don't know.

Dungan: The cards you played with before, where did they come from, do you know?

Robert Wood: I believe they came from up there at one of those 7-Eleven stores.

Dungan: Who bought them?

Robert Wood: First time we played he already had some cards there and the second time we went up and got some.

Dungan: Where? The Seven-Eleven Store?

Robert Wood: Yes, sir.

Linville: I'm assuming that in your opinion he was cheating.

Robert Wood: I imagine so.

Linville: How?

Robert Wood: I don't know how. I've heard of the man before after he was identified today. I've heard of Douglas before, but I'd never met him and didn't——

Dungan: Where did you hear from him before?

Robert Wood: Well, I'd heard he was in this town a couple of years ago and played a man.

Dungan: Who did he play on that time?

Robert Wood: He played a man up in Tipton County.

Dungan: Who was that?

Robert Wood: Haen.

Dungan: Akin?

Robert Wood: Yes, sir.

Lewis: Do you feel like those cards were marked cards?

Robert Wood: Well, I suspected they was. That's the reason I wanted to go with him to get some plastic cards.

Scruggs: You thought the paper cards were marked cards?

Robert Wood: I suspected they were.

Scruggs: Any glasses—did he have glasses when he played?

Robert Wood: Rim glasses.

Scruggs: He did wear rim glasses when he was playing cards. Did he normally wear glasses when he wasn't playing cards?

Robert Wood: Yes, he had the glasses on while he was watching television too.

Scruggs: At any time that you met him did he have glasses on?

Robert Wood: Well, he had glasses on most all the time I met him.

Dungan: Back when ya'll left the apartment to go buy the cards did he have the glasses on? Look at these photographs here. Look close. Do you recall any of them?

Linville: Do you know Woppy?

Robert Wood: I know him by that name. I don't know his real name.

Dungan: Did Douglas call you on this Monday at any time in the day or the night as far as that goes?

Robert Wood: We had an appointment to play that night.

Dugan: You had an appointment—when was this appointment set up?

Robert Wood: From the previous Thursday.

Dungan: From the previous Thursday.

Scruggs: Was that down at the pool hall where you were contacted—Hershel's?

Robert Wood: We played on Thursday. Yeah, it was.

Scruggs: He contacted you at Hershel's?

Robert Wood: I played Woppy some pool one night for about forty-five minutes.

Dungan: Well, let me ask you this. Was there ever anything discussed between you and Douglas about bringing blank over there or anybody else to the game? I think you said on the previous occasion that ya'll were the only ones there. How come on this night that there were two other people there, blank and this other fellow?

Robert Wood: Blank, he don't gamble hardly any at all. I'd called him at work and he told me he could bring me some money when he closed up.

Dungan: At the time you were playing, did you ever tell

Douglas that you were going to bring blank with you or did you just bring him there that night?

Robert Wood: I just brought him there that night cause I had called him for him to bring me some money.

Dungan: All right, but you didn't tell Douglas he was coming?

Robert Wood: Yes, sir, that's right, I didn't.

Dungan: Did Douglas object to him being there, you think?

Robert Wood: He said, well—when we showed up, he was watching television and I don't told him I wasn't playing unless we went to get some plastic cards.

Linville: You didn't have a telephone conversation with Douglas in which you mentioned blank was coming?

Robert Wood: No, sir.

Dungan: At any time during one of these games did you leave the game and go borrow some money from anybody?

Robert Wood: Yeah, I went and borrowed some money from James Hughes on one occasion. I forget now whether it was the first or second one.

Dungan: How much did you borrow?

Robert Wood: A thousand dollars.

Dungan: One thousand dollars?

Robert Wood: That's right. I brought it back to him and paid him back.

Dungan: While ya'll were playing this last game did anybody take the dog out for a walk?

Robert Wood: No.

Dungan: Stayed shut up in the apartment the whole time?

Lewis: Monday night did the dog start barking for someone to let it out to use the bathroom?

Robert Wood: I don't recall it.

Lewis: You can't remember the dog started barking and wanting out and nobody would let it out? Nobody left the apartment for any reason?

Robert Wood: Not that I know of.

Dungan: You didn't go in another apartment or talk to anybody going out the front door of that apartment?

Robert Wood: No, sir. I got to my car as fast as I could.

Linville: Have you ever heard of Titanic Thomas?

Robert Wood: Heard of him—never met 'em.

Linville: Do you know whether he has any relatives in town or not?

Robert Wood: No, but I heard he had a son, but I don't know where he is. I just heard he had a son.

Linville: Was that Titanic Thomas' son that was in the game with you?

Robert Wood: I'm not sure. His name was Tommy is all I know. No one played in the game except me and the other man.

Dungan: I want you to look through these photographs and—— (interrupted)

Robert Wood: No one played in the game except me and the other man.

Linville: I didn't mean that—I meant Tommy.

Robert Wood: This is Woppy.

Dungan: This is Woppy, number 113854, is that who you identified as Woppy?

Robert Wood: Yes, sir.

Lewis: Was any furniture turned over?

Robert Wood: Darned if I know. I was excited and just got out as fast as I could.

Dungan: Do you recognize that photograph?

Robert Wood: Yeah, I guess that's him. Somewhat different dress.

Dungan: How about that one—the other one?

Robert Wood: It's not—you can't see it too good but I guess it's the same guy, I'm not sure.

Lewis: Is that the man you were playing cards with?

Robert Wood: I'm certain, almost positive of it. I'm pretty sure it is. I'm almost positive cause I'm use to seeing him dressed, not with his shirt off.

Dungan: Look at this photograph here. See that shot right there, do you wear glasses, Mr. Wood?

Robert Wood: No.

Dungan: Do you recognize that—did you ever see that before?

Robert Wood: I don't know whether it's a ring, a key ring or what it is.

Lewis: Have you ever been to Woppy's house?

Robert Wood: No. I've only seen him around different places. I've seen him in Tupelo. I seen him in oh, numbers of places.

Lewis: Did he set up the game? Did he tell you a game was in progress?

Robert Wood: He told me they played on Tuesdays and Fridays.

Lewis: That's your first contact with playing cards?

Robert Wood: Yes, sir.

Lewis: On Benbow Drive with Woppy?

Robert Wood: Yes, sir.

Lewis: Did he write it down on a piece of paper and give it to you?

Robert Wood: No, he told me where—I followed him out there and then he left.

Lewis: Does he know your name?

Robert Wood: No.

Lewis: What kind of car does he drive?

Robert Wood: A maroon Ford.

Lewis: Was he by himself?

Robert Wood: Yes, sir.

Linville: Monday night, who all used the bathroom?

Robert Wood: I believe all three of them were in the bathroom on one or two or just on one occasion.

Linville: How about in the kitchen?

Robert Wood: They went in to take a—mix a drink. The kitchen's real small. I can see in the kitchen from where I was sitting.

Dungan: Well, you could pretty well see down the hall from where you were sitting, couldn't you?

Robert Wood: No, well you can see the first bedroom door. You can't see the second one and you can't see the bathroom.

Scruggs: Robert, I want to ask you a question. Did you carry a weapon inside that room, any kind?

Robert Wood: No, sir.

Scruggs: To the best of your knowledge, did blank take a weapon, any kind, either a knife or a gun in the room with him?

Robert Wood: I don't think so. He had on pretty tight britches.

Scruggs: You do know this dead man, Blaylock, had a pistol on him?

Robert Wood: Yes, sir.

Scruggs: How far were the others from him when they shot?

Robert Wood: Three to five feet.

Scruggs: Three to five feet?

Dungan: Did you tell anybody, other than blank, that you were going to be playing cards for pretty high stakes at that apartment prior to Monday night?

Robert Wood: No, sir.

Dungan: How about the man you borrowed money from, previous occasion, did you tell him where you were playing or who you were playing with?

Robert Wood: No. I didn't tell him who I was playing with because I'd told him the man's name was Ray—what he told me.

Dungan: Did you tell the man you borrowed the money from that you were going to be playing poker or playing cards, using the money to gamble with?

Robert Wood: I just told him I'd pay him back either late that night or the next week.

Lewis: Was the man you know as Ray wearing glasses when ya'll played?

Robert Wood: Yes, sir.

Lewis: Did he wear them all the time, when he met you or just put them on?

Robert Wood: I wasn't around him that much, but what time he was watching television he had on glasses.

Dungan: You don't recall whether he wore them in the store when you bought the cards?

Robert Wood: No, I don't.

Dungan: Show me where you were sitting. Was the table sitting over here, like this—this is the kitchen, this is the hallway.

Robert Wood: It was sitting over this a way.

Dungan: Alright, where were you sitting?

Robert Wood: Now, from the kitchen I was up—there's a partition back here that doesn't show it and I was sitting with my back to that partition.

Dungan: Where was Ray sitting?

Robert Wood: With his back to the kitchen. Directly across from me.

Linville: The way that the game was arranged for that day, you said it was previous, you said it was a previous arrangement, and what day was the other game, the game you had just before that?

Robert Wood: Thursday.

Linville: That was on a Thursday? July 2nd, and that's when the arrangements were made?

Robert Wood: Yes, Sir.

Lewis: And, blank didn't play Saturday? When were the arrangements made for the game Monday? That's what I was getting at.

Robert Wood: On Thursday, when we played the last time.

Linville: Thursday, the last time you played?

Lewis: You didn't play Saturday or Sunday?

Linville: Then did the boy come over to borrow the vanilla?

Robert Wood: I don't really know what day it was. It was a young boy. I remember him coming to the door.

Linville: You said it was the second night you played.

Robert Wood: The second time I was there.

Linville: Is that when the arrangements were made for the next game?

Robert Wood: Yes, Sir.

Linville: That was a Sunday, that was July 5, 1970.

Robert Wood: When the boy came there for the vanilla?

Linville: When the boy came there asking for the vanilla was Sunday, July 5, 1970, the day before this game.

Robert Wood: I remember a young kid coming——

Linville: Coming and asking for the vanilla, right?

Robert Wood: Yes, Sir.

Linville: Well, that's, that was on Sunday, that's what I'm trying to help you get your dates straight a little bit because they're off right now. This was the night before the fatal game.

Dungan: He played the night before the fatal game?

Linville: How did Douglas know that blank was coming to the game?

Robert Wood: He didn't know it, I don't guess.

Linville: He's told some people that blank was coming to the game. That's what I meant. You said you didn't get a telephone call from him. This is just a point we're trying to clear up.

Robert Wood: I was thinking it was Thursday when the boy come to the door. He tole me to answer the door. I opened

the door and there was a boy there who said, 'I want a bottle of vanilla'. He growled and said, 'We ain't got no vanilla' and shut the door in his face, but there was not activity taking place.

Linville: No, there was no activity taking place, but this was Sunday and that's when the game took place.

Hinds: Were you ever there in a game on Sunday?

Robert Wood: Not that I know of.

Lewis: You weren't there in a game on Sunday?

Robert Wood: No, Sir.

Linville: Where did the beer come from? Did you say blank was drinking beer? Where did it come from?

Robert Wood: It was in the refrigerator there.

Lewis: How about the whiskey?

Robert Wood: It was sitting over there on the table and it was whiskey there everytime I was there.

Lewis: And the beer was there also?

Robert Wood: Yes, Sir.

Lewis: But you did not get a telephone conversation from either Douglas or Woppy on Monday?

Robert Wood: Well, Woppy has got a phone number over there at the apartment.

Lewis: At the apartment?

Robert Wood: At the apartment, yeah, but uh——

Lewis: And, that's that 332.

Robert Wood: I believe it's 2659.

Lewis: But he didn't call you there or you didn't call him? Where was he staying?

Robert Wood: I have no idea.

Lewis: So, you couldn't have called him and if he had called you that's where it would have been?

Robert Wood: Uh huh.

Lewis: Well, where were you at Monday? What did you do Monday before the game?

Robert Wood: I was at an apartment all day and called blank and told him I might need some money that night, to meet me. I was at the apartment nearly all day Monday.

Lewis: Can you recall going anywhere?

Robert Wood: No, didn't go anywhere.

Signed Robert Hugh Wood."

(Conclusion of reading of statement to jury.)

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3. **TESTIMONY OF ROBERT HUGH WOOD:**

DEFENDANT'S PROOF

ROBERT HUGH WOOD

The said witness first having been duly sworn, testified as follows:

Direct Examination by Mr. Stanton

Q. State your name, please. A. Robert H. Wood.

Q. Where do you live, Mr. Wood? A. Tupelo, Mississippi.

Q. Do you have a family? A. Yes, sir, a wife and four children.

Q. Where are your children? A. They are at home.

Q. How old are they? A. 13, 9, 7 and 6.

Q. All of them in school? A. Three of them are in school.

Q. One hadn't started yet? A. The one that's six hasn't started yet.

Q. Where were you brought up? Where were you reared? A. Huntingdon, Tennessee.

Q. What was your father's occupation?

Mr. Strother Objects: Your Honor, I am going to object to this line of questioning. It's irrelevant and immaterial.

The Court: Sustained. Usually that's restricted and limited so don't please try to go too far into it. It's collateral and the State's objecting to it.

Q. Alright, I just wanted the jury to know something about his background.

The Court: The Court usually allows some matters of that nature. Limit it. Sustain the objection. Give you some latitude.

Q. What his father did, that's the last one I'll ask.

The Court: Yes, sir, alright.

A. He's been dead about eight years, 17 years before he died, he worked for the Corps of Engineers.

Q. Now, let's get on to the case in hand and I'll ask you if you knew a person named William Douglas? A. I knew him by that name later but another name first.

Q. What's the first name you knew him by? A. Ray Blaylock.

Q. And, tell the jury how you came to know, when you first has some dealings with Ray Blaylock or William Douglas? A. When, I only knew him by his nickname, Whoppy, took me to an apartment to meet him.

Q. And, when was that in relation to this homicide? A. I don't know exactly, approximately about three weeks before.

Q. Alright, sir, what happened on that first occasion that you had some dealing with Ray Blaylock or Douglas? A. I was told by Walter Gaddy that there was going to be a poker game that night and I followed him out to the apartment where he showed me where he lived.

Q. Were you expecting anyone else? A. He told me they had a regular game that night.

Q. And, how many people were you expecting? A. Anywhere between five and seven or eight I guess.

Q. And, did he tell you anything about Blaylock? A. He told me he played golf with him at a country club and played cards with him on one or two occasions.

Q. And, what happened when you got over to Whoppy's apartment? A. Well, I didn't know it was Whoppy's apartment. When I got over there, it was just man there known as Ray and we watched television a while and he said these other people were going to be here shortly and after 30 minutes or so we just started playing cards waiting on somebody to show up.

Q. And, then what happened? A. Oh, as we played and he increased the price and I would say I played about three hours, three and a half hours.

Q. What were you playing the first night, Mr. Wood? A. We was playing Rummy to start with and after I got three or four hundred dollars loser he turned it into poker.

Q. Whose cards were you using this first time? A. Well, we was using the ones that was already there, supposed to be set up for the other players to come in with. I just went ahead and played with the cards that was there the first night.

Q. And, did you win or lose? A. I lose.

Q. How much did you lose? A. Twenty something hundred dollars.

Q. This is the first night? A. Yes, sir.

Q. What kind of poker were you playing this first night? A. Well, we played two different games, we played low ball and we played some seven card high, played both games, mostly low ball.

Q. How, tell the jury how low ball is played, what the rules are about that? A. Well, we was playing seven card low ball, just like seven card high poker if they know what that is and except for the lowest hand wins. Placing cards in pairs counts against you.

Q. Alright, and, when did you next see Douglas? A. I guess about, I don't know exactly, about a week after that I guess.

Q. Where did you see him this time? A. At the same place.

Q. Did you think you had been cheated the first time you played, Mr. Wood? A. Well, I wasn't sure, I was skeptical because they said several people was going to show up and no one, not even a single sole showed up.

Q. Alright, what happened on the second time you played? A. Well, I played him some more low ball and I lose again.

Q. Now, how much did you lose the second time? A. Oh, between $1500 and $2000 again.

Q. And, did you, you were playing low ball all night? A. Yes, sir.

Q. Now, when did, when did you see him the next time? A. After that?

Q. Yes, sir. A. I went over there with Thommy Thomas and he played him.

Q. Went over where? A. To the same apartment.

Q. Alright, and, what was the agreement about playing him this time? A. Well, he played him a thousand dollars worth, he puts up four hundred dollars and I put up six hundred dollars. He didn't have, I was going to put up five hundred a piece with him but he didn't have five hundred he said so I was supposed to receive two-thirds of it.

Q. A portion to share. And, did you win or lose or did Tommy Thomas win or lose? A. He lose the thousand he was playing.

Q. What were they playing? A. They were playing low ball.

Q. And, you had given him how much money, Tommy Thomas how much money? A. Six hundred dollars.

Q. So you had lost about how much money to Douglas prior to July 6, 1970? A. Oh, around $4500 I guess.

Q. Alright, now, going to the night of July 6, 1970, what happened on that night earlier in the evening? A. At the apartment?

Q. Yes, at the apartment? A. I arrived there before 7:30 because he was still watching a program at that time.

Q. How did you know to arrive there at that time? What type of arrangements had you made? Had you made any arrangements to play that night? A. Yes, sir.

Q. When were they made? A. Over the telephone and we talked about it the last time we played too.

Q. Alright, and, you arrived over there I think you said 7:30? A. Ten or fifteen minutes before 7:30.

Q. Who was with you if anyone? A. My brother Joe Wood.

Q. And, what kind of car were you in? A. I met him and we was in my '67 Plymouth.

Q. Alright, you met who? A. Joe Wood.

Q. And, did you have any kind of weapon with you? A. No.

Q. Then what happened after you got there? Who was there? A. Nobody but Douglas or Ray whichever way you want to refer to him.

Q. And, what happened after you got there? A. He finished watching the program and we just sat down there, wasn't in a hurry or anything said at all. We wasn't there over five minutes or so before Tommy came in.

Q. How much money did you have on you this time, Mr. Wood? A. Real close to a thousand dollars. I got eight hundred from my brother.

Q. And, I didn't understand you, eight hundred in addition to your thousand? A. Yes.

Q. So you had a total of how much money on you? A. Right at $1800.

Q. Alright, then did you go anywhere to buy cards or anything? A. We went, we discussed it before and I told him I would play with plastic cards. We went to Lowenstein's.

Q. Which one? A. Lowenstein's South. Four of us went.

Q. Huh? A. Four of us went.

Q. Who? A. Douglas, Tommy and Joe and myself.

Q. And, did you buy the plastic cards? A. Yes, sir, two decks.

Q. And, then what happened? A. We went directly back to the apartment.

Q. Alright, did you start playing anything? A. We started playing low ball.

Q. And, were you winning or losing at the beginning of the game? A. Well, the first 20 or 30 minutes, I was five or six hundred dollars the winner and after we played about 20 minutes, I started losing.

Q. Alright, what, where was your brother Joe Wood during this period? A. Him and Tommy wasn't real close to the table where they could see our hands. They were in the living room. They were in the living room. One of them was in a chair and one of them was on the couch.

Q. Where is that sketch? Pass it to the witness. That's State's exhibit number 11. That's a sketch of the premises. Now, Mr. Wood, if you would just step down here if it's alright with the Court?

The Court: Yes, sir.

Q. And, I want you to look at that thing for just a few minutes and get yourself familiar with it. I don't know whether you've seen it or not. You haven't, have you? A. I've seen it before but it don't look to me like the layout of the apartment.

Q. Well, it's not to scale, Mr. Wood, but it's the best we've got under the circumstances. Would you come down here so that everybody can see and show them where the table was where ya'll were playing poker? A. I believe it was a small dining room table just let out. Right here. Here is the table directly behind the entrance. You go in the kitchen and the table is right here.

Q. Alright, and, whose back is to the wall and who was facing, whose back was to the front door? A. My back was to the partition right inside the front door.

Q. And, Douglas was where? A. His back was in the kitchen hallway.

Q. Alright, let me have that back. Where was Joe? A. Like I say, he was somewhere in the living room either on the couch or in a chair one or the other. They both wasn't sitting on the couch. One of them was on the couch and one was in the chair.

Q. And, where was Tommy? A. In the living room.

Q. All four of you were in there? A. Well, it's sort of all in the same room but the dining room table was over to the side.

Q. Did anyone leave? A. Between 8:30 and 9:00, Joe had been drinking beer and ran out of beer and asked Tommy did he want to go with him to get some beer and he turned around and asked me and Ray or Douglas did we want any cokes, milk or anything from the store.

Q. And, did you? A. Nobody asked for anything.

Q. Were you drinking anything? A. No.

Q. I mean anything alcoholic? A. No.

Q. Was Douglas? A. Very little if any, I don't remember.

Q. Alright, your brother left. Tell us what took place while he was gone? A. We just continued to play poker. I guess I lost a little while he was gone.

Q. Alright, was Douglas armed? A. He had a pistol on him and on every occasion I guess.

Q. Did he have a pistol—where did he keep his pistol? A. I seen it on one occasion in his pocket mostly, the last time he had it outside of his pants and the pistol was inside of his pants then.

Q. Did the pistol have a hammer on it? A. Yes, sir.

Q. Could you tell what kind of a pistol it was? A. It appeared to me to be a .38, almost like a policeman uses, snub nose special.

Q. Alright, did you have any weapon? A. No, sir.

Q. Alright, then what happened after Joe left? Did Joe come back? A. Well, there was a knock on the door and Douglas told Tommy to check the door. He went over there to the door and pulled the curtain back an inch or two and said something about some shadows being out there or something.

He said I ain't sure whether it's, what's going on and Douglas jumped up and run to the back and got the shotgun.

Q. Got which shotgun? A. Automatic shotgun, I guess it's the same one.

Q. This shotgun has already been received into evidence. A. I never expected the shotgun or his pistol. It's just what I seen.

Q. Alright, where did he get the shotgun? A. Well, I didn't see where, he went in the back and got it somewhere out of the back.

Q. Alright, then what was he doing? A. He came back to the doorway. Tommy kept insisting that there was several people out there or thought he seen something. Douglas stood in the doorway in the hallway after he come back in there, cocked the shotgun in one arm and the pistol in the other one and he said just open the door and let them through.

Q. And, your brother was outside at this point? A. Yes, sir.

Q. Did Joe come in? A. He kept saying that, Tommy asked him I guess eight or ten times who was it and Joe finally said it was some people that went upstairs or something and Douglas still wasn't sure so he told Tommy to open the little window beside the door. If he's by himself, let him through that window.

Q. Was he pointing anything at him when he came in through the window? A. He walked——(Interrupted)

Q. Did he come in? A. He came in and oh, it's a real small window. I probably couldn't even get through it and had to crawl through it and Douglas had walked over closer to him still holding the shotgun and pistol.

Q. On who? A. On Joe as he came through the door. He had done asked me before if I had a pistol and I stood up and showed him I didn't have.

Q. And, what did Joe do after he got in? A. Douglas said something to him, I forget exactly what it was, looked at him real close. He had on just a pants and shirt. He didn't appear to have no weapon. At that point, after he talked a minute or two, I forget exactly what was said and he said well, everything appears to be alright, let's resume the poker game. I said at this point I didn't, I was ready to leave. I wanted to quit and as we was standing up our money was still on the table. He said no, we are going to finish the game.

Q. Who is saying this? A. Ray or Douglas.

Q. Alright. A. He said we are going to play at least until one of us wins or loses what's on the table.

Q. Did he have the pistol on you? A. Well, he was holding it at Joe, around down, I didn't have one at the time. He set the shotgun down somewhere, I don't know where, put the pistol back on him and oh, I guess it was a few minutes elapsed there and we continued to play a short while.

Q. Why did you continue to play? A. Well, he said, he was holding a pistol and shotgun and said we are going to play until we win or lose what's on the table.

Q. Alright, what was your brother doing? A. He sat down, him and Tommy both sat down.

Q. Did he leave the room? A. After about five to six, seven minutes of playing, he stood up and asked Douglas can I go to the bathroom.

Q. What did Douglas tell him? A. Yeh, Douglas had looked at him when he come through there and he asked him, Douglas, if it was alright if he went to the bathroom.

Q. Then what happened? A. Well, he was in the bathroom a matter of a minute or so and when he came out and walked up behind Douglas which Douglas was almost between the kitchen door, was close to the hallway when he walked out of

the hallway. He walked up to Douglas from behind and had a, I guess it's the same Derringer and told Tommy and Douglas to get on the floor. Tommy did and Douglas didn't.

Q. Did he take Douglas' gun away from him? A. No.

Q. Did he take any money off the table? A. No.

Q. What did he do? A. As soon as Tommy laid down, he said well, let's, we might as well get out of here and he handed, he went on first and handed me the pistol.

Q. Was the door barricaded at this point? A. Well, the two by four was up under it.

Q. Up under what? A. Up under the doorknob.

Q. Alright. A. He went out the door. I was going to, I was dumfounded because I didn't know that he was coming out of the bathroom with a pistol. In fact, I didn't even think that he had one on him because Douglas looked him over real good when he come through the window.

Q. Alright, then what did you do? A. Well, I knew Tommy from sometime before. Tommy's just, I think the pistol was still in my hand. I wasn't pointing it at anybody. I dropped it down to my side. Tommy got up and said we get to get some things straightened out and went over and locked the door.

Q. Then what happened? A. Well, as he was locking the door, I am talking to him. Douglas reached to his waist band for the gun and I just swung around and snapped the shot.

Q. What happened then? A. Well, he fell at the end of the table.

Q. Then what happened? Anybody enter the room? A. Well, it wasn't but just a matter of a few seconds before the door came in.

Q. Who came in? A. I didn't see anybody but the three colored guys that came in. One of them fired a shot into the wall.

Q. Do you know which one it was? A. Not for sure.

Q. Did you know any of the three colored men that came in at that time? A. Well, one of them had worked for my brother for a matter of six years, I didn't, wasn't familiar with him too much but I had seen him working for him.

Q. Which one is that? A. The one in the middle.

Q. Let the record show, he's talking about Isiah Hamilton. Did you know either Randolph or Pickens at that time? A. I never met them.

Q. Had you ever had any dealings with these three, with the defendant Pickens or Randolph or Hamilton? A. I only talked to Joe.

Q. Alright, and, after they busted into the room, what happened? A. Well, there was a shot fired into the wall and Douglas didn't appear to be dead but he was hurt real bad. They started, one of them got ahold of Tommy and I told them not to hurt him.

Q. What happened to the money that was on the table? A. Well, the $1800 that I started with, I, after that, I picked up most of the money that was on the table and stuck it in my pocket.

Q. Whose money was it? A. Well, I started with $1800 and I had lost some money, $4500 or so previous to that and there was around $3000 on the table, between $2500 and $3000.

Q. Then what did you do? A. I went to the, my car, just before I went out of the apartment, I didn't go close to Douglas but Tommy was standing over there pretty close to him and he said I ought to call an ambulance, said you get on out of here before you get into any more trouble.

Q. And, you did that? A. I did that. I was next to the last one to leave and Tommy was the last one to leave.

Q. And, where was Joe at this point? A. By the time I got out to my car, he was out there.

Q. Did you pick up any of the weapons that were in the apartment, any of the weapons, shotgun or any of that? A. I carried the Derringer to the car that I had in my hand.

Q. Did you pick up any other weapon? A. No.

Q. Alright, whose car did you go to? A. My car, '67 Plymouth.

Q. Who was with you if anyone? A. Well, Joe was out there at the car about the same time I was.

Q. And, what happened, what were the three black men doing? A. They had done left ahead of us in Joe's car, the GTO.

Q. And, where did you go? A. Joe said, he told me where to go, said follow him, I want to get my car and we followed them to where I think one of them lived. Anyway, they all got out there.

Q. Did Joe get his car? A. Joe talked to them for a while and then we, I followed, he got his car.

Q. I beg your pardon? He did get his car there? A. Yes.

Q. Then where did you go? A. We went to a place and stopped and talked and from there I went, we got in one car and I went to a pay phone.

Q. Alright, up to this point, Mr. Wood, did you know who Blaylock was? A. No.

Q. Who did you—you knew him as what? A. Knew him as Ray Blaylock.

Q. Alright, then you went to a pay phone and what did you do at the pay phone? A. I called Barbara King Howell's apartment.

Q. How come you to call it? A. For Tommy.

Q. Alright, then what happened, did you talk to Tommy over there? A. She answered the phone and then I talked to Tommy.

Q. Did he tell you who Blaylock was then? A. Yes, he told me it was Douglas.

Q. Had you ever heard of Douglas? A. Many times.

Q. Alright, then what happened? A. Well, the same story that I told to start with on that statement, him and I talked a little bit about it on the telephone and he said he would tell the same story not identifying anybody. In fact, I think he did tell the FBI the same story.

Q. Alright, did you go to Barbara King Howell's apartment? A. Later, after he told me it was William Douglas I knew that from stories I had heard about him since, from many, many people——(Interrupted)

Mr. Strother Objects: Your Honor, I object to what he's heard. I object to any hearsay.

The Court: Mr. Stanton, you know the rules that would make any information applicable here on this situation. I don't know how far you intend to go.

Q. I'm not intending to go r y further.

The Court: Alright, the State objects to hearsay at this point. I believe it's a proper objection unless you qualify somebody to ——(Interrupted)

Q. Well, the deceased reputation, he didn't know who the deceased was before he killed him so he can't get it in as part of that but I think his reputation may have, the fact when he found out who he was and his reputation made him do certain acts, namely go to Barbara King's apartment.

The Court: I think you are privileged some latitude there, yes, Sir.

Q. Alright, Sir. You knew who this man was, didn't you, at that point? A. Yes, Sir, I knew two people real well that's told me about him in the past.

Q. And, that information did what to you? A. Well, I knew that Tommy's father and this man had been friends for many, many years.

Q. Tommy Thomas' father? A. Yes, Sir.

Q. Alright, what did you think as a result of that? A. Well, Tommy's father and him both were excellent marksmen and had been in numerous shootings.

Q. And, you were scared that they might come get you? A. Yes, Sir.

Q. So what did you do then? A. I was discussing it with Joe. I said as soon as Tommy gets back out west and says something about this, that they might very well send somebody back looking for us.

Q. So what did you do? A. I went over to the apartment on, Barbara King Howell's apartment to talk to Tommy about it.

Q. Was anybody there when you got there? A. Barbara King Howell and Tommy was all.

Q. And, who went with you? A. My brother, Joe Wood.

Q. Alright, you had a conversation with Tommy over there? A. Yes.

Q. And, what did you tell him? A. Well, we still talked some more about the first statement I gave and he agreed with that. I said I know that Douglas and Ty was real good friends. I said what are you going to do about that and he said well, as far as I'm concerned it's all over with except the story part. I said just make sure of that where that you don't have nobody come looking for both me and Joe.

Q. Then where did you go? A. Went back and let, took Joe back to his car and we was in my car at that time.

Q. Then what did you do? A. Well, I, instead of doing like I said in the statement, I went back to the apartment and spent the night, went by and seen Joe the next morning and I went back to Mississippi.

Q. Alright, did you know that you were being cheated? A. I knew beyond a reasonable doubt that I was.

Q. When did you figure it out? A. In the second game for sure. I was expecting it in the first game because nobody else showed up.

Q. And, did you know how you were being cheated? A. Well, not exactly, I kept watching for it, everything I could think of but I still didn't definitely catch it.

Q. Why did you want to get plastic cards? A. Well, paper cards, sometimes people can even bend them where they can tell them apart. Mostly plastic cards jump back in place.

Q. When Douglas pulled his pistol on you and told you to, I believe you said he told you you had to continue playing, did he not? A. Yes.

Q. Were you afraid at that time? A. Well, naturally you are afraid of anybody with a gun in their hand.

Q. Were you, did you think he might use that gun? A. I would think so because he stood in the doorway with a shotgun and pistol and told Tommy which Tommy wouldn't do it, told him to open the door and let anybody through that wanted to.

Q. Did, is that the reason you sat down and continued to play instead of leaving there? A. Yes.

Mr. Strother Object: I object to leading the witness.

The Court: Don't lead him, sustained.

Q. Is that the reason you did what you did? A. Yes, Sir.

Q. What did you do? A. Well, when he——(Interrupted)

Mr. Strother Objects: Again I object.

A. When he reached for the pistol I shot him.

Q. What did you do is not leading, if your Honor please.

The Court: We'll let him answer that, yes, Sir.

Q. I didn't hear you. A. When I was talking to Tommy and I walked around, he was reaching in his belt for the pistol. I just wheeled around and shot that little ole Derringer which I guess I was lucky to hit him because if I didn't, he would be on trial instead of me.

Q. I believe that's all.

The Court: Alright, I believe the proper order would be for the other defendants to cross-examine this gentleman and then the State.

Mr. McKnight: I have no questions on behalf of the defendant, Joe E. Wood.

The Court: Alright, any other defendants, either one or all of them?

Mr. Smith: James Randolph has no questions, your Honor.

Mr. Cassell: No questions at this time. I would like to reserve the right to question him further later.

The Court: Alright.

Mr. Sabella: No questions.

The Court: The State.

Mr. Strother: I have a few.

The Court: Alright.

Cross-Examination by Mr. Strother

Q. Mr. Wood, if I understand correctly, the first time that you had ever seen William Douglas was the night that, I think so we will understand each other I think the jury will understand, by calling his name Whoppy. A. Yes.

Q. Carried you over to an apartment which is Benbow Apartments, Benbow Apartments, 3403 Number One where this incilent occurred, is that correct? A. Yes, sir.

Q. And, about how long prior to the shooting was that? A. I don't know the exact date, around three weeks.

Q. About three weeks and I believe that you played cards with him that night, did you not? A. Yes, Sir.

Q. And, you played for what, I think we can agree, for a considerable amount of money? A. Yes, sir.

Q. Somewhere in the neighborhood of $2000, is that correct? A. Yes, sir.

Q. And, you lost, is that correct? A. Yes, sir.

Q. Did you play table stakes that night? A. Yes, sir.

Q. Do you know what tables stakes means? A. Table stakes is you can't take anything out of your pocket.

Q. Alright, Mr. Wood, just so we'll understand and everyone'll understand, you are not trying to give these gentlemen the impression that you are not a gambler, are you, sir? A. I've played poker before, yes, sir.

Q. I mean, you've done a little more than play poker before, you've played a lot of poker, don't you, I mean, compared with the average man?

Mr. Stanton Objects: I don't see that that's relevant, if your Honor please.

The Court: We'll overrule the objection, Mr. Stanton.

Q. In fact, you own an interest, do you not, in some gambling establishments, is that correct? A. No, sir.

Q. Were you or were you not in the process of negotiating with Tommy Thomas to sell him an interest in a club in Tipton County that you owned an interest in? A. I've never owned a club in Tipton County.

Q. You never had an interest in such a club, is that correct? A. No, sir.

Q. But you've played cards, poker? A. Yes.

Q. And, you've played a considerable amount of poker? A. Yes.

Q. And, you've played for the kind of stakes we are talking about here or if we've talked about it, in the neighborhood of two or three or four thousand dollars at a time, is that correct? A. On a few occasions.

Q. On few occasions. Now, you lost $2000, did anybody put a gun on you or in any way force you to come back to that apartment some three or four days later to play poker again? A. No, sir.

Q. You came back there of your own free will and accord, did you not? A. Yes.

Q. And, you went back there to play cards, is that right? A. Yes, sir.

Q. And, you went back there to play cards seriously, this wasn't any friendly game but you were playing to win, right? A. I imagine that most everybody tries to win when they are playing for quarter or dollars.

Q. But you were serious about this game, is that right? And, nobody forced you back to this game, is that right? A. No, sir.

Q. And, the next game that you set up or that was arranged with Tommy, I believe played, is that correct? A. Yes, sir.

Q. You were in agreement that that game take place. Nobody forced that game, did they? A. Nobody forced it.

Q. That was with your consent, you went along with this? A. Tommy said he would play the man and he could determine whether he was cheating or not and I told him I suspected he was and he said I can determine whether he's cheating or not.

Q. Is all this being done in just the interest of society to see if this man is cheating or not? A. I figured if he wasn't cheating I might attempt to play him some more to see if I could win some of the money back I had lost.

Q. So you were playing to try to get even now, is that correct? A. If possible.

Q. And, you gave Tommy $600 of your money, is that correct? A. That's right.

Q. With the idea of getting even, is that correct? A. Well, if possible.

Q. And, on the night of July 6th, how much money did you take into that game? A. I had $1000 and Joe brought $800 with him.

Q. So that's $1800? A. Yes, sir.

Q. We are talking about table stakes, is that correct? A. Yes.

Q. What does table stakes mean to serious gambling? A. It means you take out the money and you play for what's on the table.

Q. And, do I understand correctly, I'm not a gambler but do I understand correctly that when you put that money on the table you put your money on the table and the man you are playing puts his money on the table and you keep playing until the money is won or lost, is that correct? Is that table stakes? A. Yes, sir, unless it comes to an agreement that you can quit before that or that both people agree.

Q. But unless there's a mutual accord the understanding is that you are going to play until somebody's got all the money, is that right? A. Yes.

Q. And, you returned with your $1800 and went out to get these plastic cards to get even, is that correct? A. Well, to win or lose.

Q. To win or lose, not to get even? A. Just to play some more poker as far as I knew.

Q. Now, when you got there that night, did you know whether this man was playing honest or playing crooked? A. I suspected he had been cheating.

Q. Well, did you think that you could beat him if he was playing crooked? A. Well, I thought if I got the plastic cards and maybe I might be eliminating some things that he was doing.

Q. Thought you might be eliminating some things he was doing. But you went there to get your money back, didn't you? A. Yes, sir.

Q. Now, was your brother in any of these other games? A. No, sir.

Q. How did he happen to come to this game? A. I had told him that I would probably need some money and I told him I suspected the man was cheating.

Q. Did you say anything to him about getting some help? A. I told him that several people there and they had guns and so forth. I told him I suspected the man was cheating me. If I caught him cheating me, I was going to ask for my money back and I might need some help to get it back.

Q. Now, excuse me, I'm not sure I understood the first part of your answer. You said something about there was several people there with guns. A. Well, I knew that there was, I had seen Douglas with guns at previous occasions.

Q. You had seen Douglas with guns on previous occasions. A. By this time I suspected Whoppy and Tommy was both in on it, that Tommy lost the money on purpose to the man.

Q. Had you ever seen Tommy with a gun? A. No.

Q. Had you ever seen Whoppy with a gun? A. Well, yes, I had seen him with a gun on the night out there at the apartment but I have seen him with a gun.

Q. Well, was Whoppy ever even there when you played cards? A. He was there a little while the first time.

Q. He was there a little while the first time? A. Yes, sir.

Q. I misunderstood you when you testified on direct, is that correct, because I thought I understood you to say that Tommy dropped you off and didn't even go inside. A. It wasn't Tommy that I followed out there, it was Whoppy.

Q. Excuse me, Whoppy dropped you off and didn't even go inside. A. I didn't say that.

Q. You didn't say that. I'm sorry, I misunderstood you. Now, you went out there to get your money back and your brother went with you and lent you $800, is that correct? A. Yes.

Q. And, you mentioned to him that you thought you were being cheated, is that correct? A. Yes, sir.

Q. And, what else did you tell him? A. I told him that I, we was getting plastic cards.

Q. That you were getting plastic cards? A. To play with and I was going to see if I could catch him cheating in any way.

Q. And, did you tell him that there were men out there with guns if I understood you right? A. I said the man had some guns there.

Q. Did you say anything to him about getting some help? A.

He said that he would bring somebody with him. I didn't know exactly who or how many.

Q. Said he would bring somebody with him? A. That worked for him.

Q. That worked for him? A. Yes.

Q. You didn't know how many—what did they work for him doing? Do you know? A. Cleaning up cars.

Q. Cleaning up cars. Do you know if that's all they did or not? A. Well, they did anything around that shop, they cleaned up cars and done upholstery work, delivered cars.

Q. Did they ever work for him in any other field?

Mr. Stanton objects: I don't think that's relevant.

The Court: I don't know what relevancy this has. It's a little far afield. I'll sustain the objection to that.

Q. Now, they were—you understood that he was to bring some people with him that worked for him, is that correct? A. Yes, sir.

Q. What were they coming there for? A. If I caught the man cheating, I was going to demand my money back and I did not figure he would be willing to give it up that easily.

Q. So you could say that they were coming there to rob this man, is that correct? A. Well, if you would call it that, I would call it if you had been cheated out of your money, you just got your money back, it wouldn't be considered as robbing somebody.

Q. So you think that you can go in at gunpoint——(interrupted)

Mr. Stanton objects: He's arguing with the witness. It's not relevant as to what he thinks his definition of robbery is.

The Court: Sustained.

Q. Well, you did understand that they were going to come in there with guns? A. I intended fully to ask the man for my money back first.

Q. Ask him? A. Yes, sir.

Q. But you didn't expect him to stand up and hand you that money back, did you? A. Well, if I caught him cheating and told him what he was doing I figured he might give it back to me.

Q. Did you ever catch him cheating? A. No, sir.

Q. Did you ever ask him for your money back? A. I told him I thought he was cheating, that I didn't want to finish the game there when he pulled the gun.

Q. Would you do that—maybe I don't understand how seriously you play cards. You just turn to a man and say I think you are cheating, give me my money back when you are playing poker? A. I didn't ask him for my money back.

Q. What did you do? A. I told him I thought there was something wrong, when he, when Joe come back through the window, that I didn't want to continue to play.

Q. When Joe came back through the dindow, you didn't want to continue to play. Was that because you thought that your help outside couldn't get to you, is that why you didn't want to play anymore? A. I didn't know who was outside.

Q. But you knew you had help outside, didn't you? A. I didn't talk to Joe any after he got there.

Q. But you told him to bring help, hadn't you? A. I didn't tell him anything. We just discussed that he had somebody working for him.

Q. That he had somebody working for him. Well, what were these people supposed to come with him? A. No, they didn't come with him.

Q. Were they supposed to come by that apartment? A. I guess that he might have told them that, I don't know.

Q. Well, were they supposed to know where this apartment was?

Mr. Stanton objects: Your Honor please, I believe he testified that he wasn't there, that he never had any contact with the three black defendants at any time.

Q. Your Honor, I think I have a right to cross-examine him about the understanding he had.

The Court: The Court will overrule the objection, Mr. Stanton. All right, General.

Q. I'm talking to you about the understanding that you had with your brother, Joe Wood. Now, you've already said as I understood you that you asked him or that you agreed that he was going to bring some help because you were going to ask for your money back if you caught him cheating, is that right? A. That's right.

Q. Well, how were these people that were going to help supposed to know where this place was? A. Well, I told Joe where it was at and I assume he had told them.

Mr. Sabella Objects: I am going to move to strike that, what he assumed, your Honor.

The Court: Sustained. Let that not be considered.

Q. Was he supposed to tell them where it was? A. I didn't discuss that part with him.

Q. He was just supposed to see to it that they got there, is that right? A. As far as I know.

Q. And, were they supposed to be armed or unarmed? A. I didn't discuss it.

Q. How were they supposed to get in the apartment? A. I don't know.

Q. When Joe left the apartment and came back, it was said there were other people outside, did you at that time realize that your help had come? A. I wasn't sure.

Q. You weren't sure, is that your answer? A. That's right.

Q. When Joe crawled in through the window or was made to crawl in through the window, did you think then that there was no way for that help to get in there? A. I wasn't thinking at all. I just wanted to get out of there by that time.

Q. And, at that time, you had no weapon, is that correct? A. That's exactly right.

Q. And, apparently Joe did have a weapon, is that correct? A. Douglas looked him over real good when he come through the window, real close, he didn't search him but he didn't appear to have one.

Q. Didn't appear to have a weapon. Now, if I understand correctly, you did sit down and start playing cards again? A. Yes, sir.

Q. The card game progressed for five or seven or ten minutes, did it not? A. About that time.

Q. And your brother got up to go to the bathroom, is that correct? A. He asked Douglas could he use the bathroom.

Q. And, he went to the bathroom, is that correct? A. Yes.

Q. And he came back from the bathroom, is that correct? A. That's right.

Q. And at the time he came back from the bathroom, he had —if the Court will indulge me for a moment—in his hand this pistol or one exactly like it, is that correct? A. Yes.

Q. And, what did he do with that pistol? A. What did who do with it?

Q. What did your brother Joe Wood do with this pistol? A. He told Tommy and Douglas both to get on the floor. Tommy did but Douglas didn't.

Q. What did Douglas do? A. Just stayed in the chair.

Q. Just sat there in his chair? A. Yes.

Q. And, what did your brother do then? A. He said well I am going to get out of here and I was dumbfounded. I didn't know that he was coming out of the bathroom with a pistol and he walked by me and opened the door and handed me the pistol.

Q. He said I'm going to get out of here, is that correct? A. Yes, sir.

Q. And, he handed you the pistol? A. That's exactly right.

Q. Did he tell you he was going for help? A. He didn't say anything except I'm going to get out of here.

Q. Except I'm going to get out of here? A. Yeh, and I told him I would be right behind him.

Q. You said I'll be right behind you so what happened then? A. Tommy started talking to me from—was getting up off the floor.

Q. Well, excuse me, what did your brother do then? A. He done went out the door.

Q. Was there a two by four on the door? A. It was under the door. He took it out and went on out the door.

Q. Was the door locked or unlocked? A. It was locked.

Q. And, Tommy was lying on the floor. Where was Douglas? A. He was still over in his chair.

Q. And, your desire at this moment was to get out of there, is that right? A. Yes.

Q. Well, what was between you and that door? A. I was so dumbfounded that I was still sitting down at that time.

Q. You were still sitting down, is that correct? A. When he handed the pistol I got up and he had done out the door—— (interrupted)

Q. Now, when he handed you the pistol——(interrupted)

Mr. Stanton Objects: Let him finish, if your Honor please.

Q. Excuse me.

The Court: Yes, sir, give him a little more time, General.

A. When he went out the door, Tommy was laying between him and the door in the living room. As soon as he went out the door, Tommy started talking to me and got up and locked the door.

Q. Well, let me see if I understand the setup out there, the card table's say over here by the kitchen door, is that right? A. By the kitchen entrance, yes.

Q. And, the door is over here, is that right? A. Yes, sir.

Q. And, you were sitting at the card table, were you not? A. Yes, sir.

Q. And, at the time he handed you the pistol as I understood you correctly you were still sitting at the card table, is that right? A. Yes, sir.

Q. So he had to be within an arm's length of that card table, did he not? A. Well, he reached—— (interrupted)

Q. When you took the pistol you stood up, did you not? A. Yes.

Q. And, he still had to go to that door. He had to move that two by four. He had to unlock that door, didn't he? A. I guess he did.

Q. And, you had the pistol all this time. What I'm asking you is what kept you from just following right along behind

him out that door? A. I didn't know that it was going to take place and I was still stunning.

Q. You were still what? A. I was still stunned from what took place. I didn't know. I didn't know that he was coming out of the bathroom with a pistol.

Q. Still stunned from what happened but you had been expecting people with pistols that night, hadn't you? A. No, sir.

Q. You weren't? A. Not, I was, I stated previously I was going to ask for my money back but it never did come to that.

Q. But you knew he wasn't going to give you your money back, didn't you? A. Well, in some cases where you catch somebody cheating they, I have heard of cases where they did.

Q. Now, you, your brother went out the door and you are standing up holding the pistol, is that correct? A. Yes.

Q. What happened then? A. Well, like I said, Tommy started talking to me and said let's get this thing straight and went over and locked the door?

Mr. Smith Objects: Objection to what Tommy said, your Honor.

Q. I believe this is certainly part of the Res Gestae, your Honor.

The Court: It would be, Mr. Smith.

Q. Now, Tommy was lying on the floor, wasn't he? A. Yes.

Q. Was Tommy during the time, your brother had already gone out the door, has not? A. He just had got out the door.

Q. And, then Tommy stands up, is that right? A. Yes.

Q. And, he starts talking to you, is that right? A. Yes.

Q. And, then immediately—— (interrupted)

Mr. Stanton: Speak up a little bit.

The Court: Yes, we didn't get your last answer.

Mr. Stanton: Speak up, Robert.

Q. Then immediately Bill Douglas reached for his belt, is that correct? A. I was talking to Tommy and when I glanced around, Bill Douglas was reaching in his belt.

Q. Reaching in his belt. And, at that time, you shot him down, is that right? A. I just swung around and snapped the shot, yes, sir.

Q. Just turned around and snapped the shot, is that right? A. Yes, sir.

Q. And, at that same time, was the door kicked in? A. Well, it wasn't long afterwards.

Q. When you say it wasn't long, was it one or two seconds or was it one or two minutes? A. 45 seconds or something like that.

Q. 45 seconds and the door is kicked open? A. Maybe a minute, I don't know exactly.

Q. And a shot is fired, is that right? A. A shot was fired into the wall, yes, sir.

Q. And, who came in at that time? A. I seen three colored guys came in.

Q. These colored guys come in. Did your brother come back in? A. I'm not sure, I didn't notice him if he did.

Q. You are not sure, you didn't notice him if he did. Now, you haven't been outside this apartment, had you? A. I had been in and out of the apartment several times. Not that night.

Q. Excuse me, that's what I mean by the question. That night you hadn't been outside that apartment, is that correct? A. No, sir.

Q. So you didn't see your brother come back in with the three male blacks, did you? They all were males, weren't they? A. Yes, sir.

Q. Let me ask you, sir, was Wilbur Pickens one of those blacks? A. I assume he was. I met them later.

Mr. Smith Objects: Objection on the assume, your Honor.

The Court: Well, answer it, Mr. Wood, as best you can, yes or no and explain it if necessary.

A. Yes, sir.

The Court: The lawyer objected—— (interrupted)

Q. Was Isiah Hamilton one of those blacks? A. Yes, sir.

Q. Was James Randolph one of those blacks? A. I assume they were because I met them later when me and, I follow Joe's car—— (interrupted)

Mr. Smith Objects: I am going to object, I feel, he could say yes or no.

Q. I think that he is giving an answer, your Honor. I think the jury has the right certainly to hear that answer.

The Court: Yes, they do, Mr. Smith. The jury is entitled to hear all the facts. If he answers it on assumption, it may be developed on cross-examination. Let's move along.

Q. You say that these were the three male blacks that came in there? A. We followed their car in Joe's car and when they got out, I think it was probably, they were in the apartment so fast that I didn't, I couldn't swear to it one way or the other at that time.

Q. Did all three of the blacks that entered that apartment have weapons? A. I would think so.

Q. Did one of the blacks—— (interrupted)

Mr. Cassell Objects: I think the question should be answered affirmatively or negatively, not not sure.

Mr. Patterson: He could be not sure.

The Court: I think we'll leave it as it is.

Q. Do you recall seeing a male black in that apartment with a weapon similar to this or this weapon? A. I don't know, I was, things were happening so fast I didn't know.

Q. Did you see any male blacks in that apartment with a .38 pistol? A. I don't know what kind of weapons they had if they had weapons. I know one shot was fired into the wall.

Q. And, was that fired by one of the male blacks? A. I assume it was. I don't know for sure who fired it.

Q. Was there anybody else there coming in the apartment except the male blacks? A. Not at that time.

Q. And, it was fired from the doorway, was it not? A. Yes.

Q. Now, after your brother Joe left the apartment saying he was getting out of there, did he ever return? A. He came back in just before we left, him and I left the apartment almost at the same time.

Q. When he came back in, were the male blacks still in the apartment? A. They were in the doorway just ready to leave.

Q. Did he come inside the apartment? A. I think he just came to the doorway or maybe just barely inside.

Q. Did he have a pistol at that time? A. I'm not sure whether he did or not.

Q. Well, now, you ran to the car and you testified or at least I understood you to say just about the same time, did he have a pistol when he got to the car? A. There was a gun in the car.

Q. What kind of pistol was it? A. I'm not sure what it was.

Q. Did he tell you whether or not he had bent across and put a pistol on Don James or the fellow across the hallway there? A. He didn't say anything about that.

Q. Didn't say anything about it. When you got back to the car, you didn't even discuss what had happened, is that correct? A. Yeh, we, he told me to, that they was in his GTO, to follow them.

Q. That they were in his GTO, is that right? A. That's right.

Q. Well, where was his GTO the last time you saw it? A. When I, let's see, I picked him up at the Krystal.

Q. Alright, you picked him up at the Krystal, is that right? A. Well, I didn't——(interrupted)

Q. You met him at the Krystal? A. I met him at the Krystal.

Q. Was he in his GTO? A. I didn't see the car at that time.

Q. You didn't see the car at that time. What did he do, walk up there? A. No, it's a big parking lot.

Q. Which Krystal is this? A. The one on Winchester.

Q. On Winchester. Did he tell you how he got there? A. I assumed he didn't walk, he didn't tell me.

Q. And, what car did he usually drive? A. Well, he's in the clean up business, a lot of times he drives any car.

Q. Does he drive a lot of cars with red dealer tags on them? A. Well, he had a dealer's license, he sold cars.

Q. And, did he on occasion or on many occasions drive a GTO with red dealer tags on it? A. He owned a GTO.

Q. And, did he sometimes put red dealers tags on that GTO? A. I don't know about that.

Q. What kind of car were you in? A. '67 Plymouth Fury.

Q. What color was it? A. Blue.

Q. Did you go to the apartment then in your Plymouth Fury? A. That's right.

Q. And the two of you got in the same car there at the Krystal parking lot and when I say the two of you, I mean you and your brother Joe, is that correct? A. I believe that's right, I'm not sure.

Q. And, drove to the apartment? A. Yes.

Q. When you left the apartment, did you get in, after the shooting had occurred to make myself clear, did you get in your Plymouth? A. Yes, Sir.

Q. Did you see the GTO there? A. No.

Q. Did not. Did you see that GTO on the interstate? A. Yes.

Q. Did you exit that on interstate? Maybe I don't make myself clear, come to think of it, I don't think I know what or understand that question. Excuse me. Did you go by way of the interstate? I was on the interstate at one time.

Q. And, was the GTO there on the interstate with you or there beside you or adjacent to you? A. No, I was following it.

Q. You were following it. Who was in the GTO? A. I don't know, I guess they were, I didn't know at that time who was in it.

Q. And, where did you go? A. Joe said follow them until he could pick up his car.

Q. Did you see anything thrown out of the car on the interstate? A. I wasn't looking that close, it was at night.

Q. It was a knife? A. Night.

Q. Night, excuse me. Was a knife thrown out of the GTO? A. I don't know.

Q. Was a weapon thrown out of the GTO? A. I don't know that either.

Q. You didn't see it if it was? A. Yes, Sir.

Q. Was anything thrown out of your car? A. Not that I know of.

Q. When you left the apartment, was anything left in the apartment, any money? A. I don't know, Tommy was still there when I left.

Q. Well, did you attempt to pick up all the money that you could find there? A. On the table.

Q. Did you go through the pockets of the deceased? A. No, Sir.

Q. You did not look in the pockets? A. I didn't go close to him.

Q. Did you take his shotgun with you? A. I didn't.

Q. Well, was it taken by someone? A. Yes.

Q. Do you know who took it? A. Not for sure.

Q. Well, who do you think took it? A. I'm not sure who took it, it's been along time ago and I don't know.

Q. You don't know. Well, now, if I understood you correctly you said that William Douglas had a pistol, is that correct? A. That's right.

Q. What kind of pistol was it? A. I don't know for sure because I never did have it in my hands. I just seen it in his possession. I think it was a .38 police special.

Q. .38 police—— (Interrupted) A. Or something similar, a similar gun to that.

Q. So that would have been in his belt when he was lying down there, is that right? A. I don't know where it was when he was lying down. It was in his belt when he was at the table.

Q. When he was at the table. You never saw it in his hand, did you, after Joe had gotten back in the apartment? A. Yes,

he had it in his hand and the shotgun when he came through the window.

Q. Excuse me but after he had gotten back and you had resumed the card game, did you ever again see that in his hand? A. Except when he was reaching for it.

Q. Did he ever get it in his hand, that's what I'm asking you? A. I didn't see how far he got it out, I seen his hand on it.

Q. But his hand did reach it? A. Yes.

Q. Well, now did you go over to his body and remove that pistol from his hand? A. No, Sir.

Q. Did your brother Joe do that? A. Not as far as I know, I don't think anybody did.

Q. Did Wilbur Pickens do it? A. Like I say, I didn't see anybody do it.

Q. None of these people did it then? A. Not as far as I know.

Q. Well, did Tommy Thomas do it? A. I don't know that, he was still there when I left.

Q. So you don't know of any—you didn't take the pistol and none of these four individuals took that pistol, is that right? A. I don't know.

Q. You don't know. Well, you were there, weren't you? A. Yes, Sir, I was there.

Q. You were in that apartment, weren't you? A. I was there.

Q. You were the last one to leave? A. No, Sir, Tommy was the last one to leave.

Q. Excuse me, you were the last of these four to leave, were you not? A. That's right.

Q. Did anyone of these four take that pistol? A. I don't know.

Q. You don't know. Well, did you see them take it? A. No, sir.

Q. Now, you, we are on the interstate, where did you go? A. Well, we went to some apartments, I assume them pictures that they gave are the two story apartments.

Q. Well, did you understand who lived there when you went there? A. I assumed one of the colored guys lived there, I didn't know which one.

Q. Well, did you know Isiah Hamilton? A. I had seen him working for Joe, yes.

Q. He worked for your brother for six years, hadn't he? A. Well, he had worked, my brother was a manager of a place before and he had worked at the same place when my brother was manager.

Q. And, you had seen him before, you knew him when you saw him, didn't you? A. Yes, sir.

Q. You were, you went frequently by to see your brother where he worked, didn't you? A. Sometimes it was three or four months.

Q. But you went by there, sometimes you would go there two or three times during one week, wouldn't you? A. Occasionally I was by there a couple of times in a week and then sometimes it would be three months before I would go by there.

Q. So you went, Isiah was one of the male coloreds in the GTO, is that right? A. Yes, sir.

Q. And, you went by to what you assumed to be his apartment, is that correct? A. Well, it was one of them's apartment, I didn't know at that time which one it was.

Q. And, did you see that shotgun there? A. They were getting something out of the car, I didn't pay any attention to exactly what they were getting out of the car.

Q. Did you——(interrupted) A. Some weapons.

Q. Did you see that little short shotgun there? A. I didn't particularly pay any attention to what gun was what.

Q. Did you——(interrupted) A. Just some weapons was all I could see.

Q. Well, now, you had this, didn't you? A. Yes, sir.

Q. What did you do with it? A. I gave it to Joe and he took it inside.

Q. You gave it to Joe and he took it inside. Of where? A. That apartment.

Q. Of Isiah Hamilton's apartment? A. Some apartment. It came out since then that it was.

Q. Did all five of you go in that apartment? A. Yes, sir.

Q. And, it was light inside that apartment, wasn't it? A. I went in there for a second and I left and went back to the car and Joe was in there a little longer than I was.

Q. They had a bunch of guns inside that apartment, didn't they? A. A few.

Q. A few. Well, they had oh, five or six, didn't they? A. More or less.

Q. More or less. Could have been more and it could have been less? A. Yes.

Q. And, they asked Isiah to hide those guns, didn't they? A. I don't know about that.

Mr. Smith Objects: Your Honor please, I am going to object. I think it ought to .... for some clarity. It's too vague.

Q. Well, did your brother ask Isiah to hide those guns or to get rid of those guns? A. I don't know for sure.

Q. You don't know for sure. But when ya'll left you had gotten rid of that gun hadn't you? A. Yes.

Mr. Smith Objects: Again, your Honor, I would like to have a clarification.

Mr. Patterson: May it please the Court, they have a right to cross-examine for clarification purposes. I feel that he can answer it the way he likes.

The Court: I think that's correct.

Q. These were the three blacks that were with you and your brother in that apartment, are they not? A. I think so, I'm not sure.

Mr. Cassell: Which apartment, please the Court?

Q. And, Isiah Hamilton was in the apartment? A. Yes.

The Court: He clarified it.

Q. And, these are the three blacks that were in your brother's GTO there on the interstate, are they not? A. I assume they were, I don't know for sure.

Q. How much money did you pick up off the table? A. Twenty something hundred dollars.

Q. Twenty something hundred dollars? A. Well, I had $1800.

Q. Now, you had $1800? A. When the game started I had $1800.

Q. I'm talking about——(interrupted) A. On this particular night.

Q. Excuse me, I'm sorry, I didn't mean to interrupt you. Finish your answer A. I had $1800 involved in this particular game.

Q. Well, how much did Bill Douglas put on the table? A. I don't know exactly.

Q. Well, how much would you say he put on the table? A. Between $600 and $800, $900.

Q. And, how much did you end up with when you got out of that room? A. I believe it was a little over $2000, I don't know exactly how much.

Q. Just a little over $2000. Less than $2100? A. I don't know exactly. It's been so long I don't remember.

Q. Was there a lot of one hundred dollar bills there? A. Well, there was a few, I had some. I think most of the thousand dollars I had was in hundred dollar bills and Joe gave me $800 in twenties.

Q. $800 in twenties. And, what were the—what denomination bills was Douglas playing with mostly? A. Mostly twenties.

Q. Most twenties. Now, when you left Isiah Hamilton's apartment, where did you go from there? A. I followed Joe and he, later on he stopped and got in my car and we went to a pay phone.

Q. What happened to Joe's GTO? A. I really don't know.

Q. Well, did he pick it up there at Isiah Hamilton's apartment or did he get back in the Plymouth with you? A. He picked it up there at Isiah Hamilton's apartment.

Q. So where did ya'll go from there? A. When he rolled over and stopped and got out of my car, that's, I talked to him a minute and called back over there to Barbara King Howell's apartment.

Q. You called Barbara King Howell's apartment, is that correct? A. That's correct.

Q. Had you known Tommy for a while? A. I had met him several times in the past year. I knew him about a year, little over a year.

Q. How had you met Tommy? A. I don't remember, I seen him a couple of times with Whoppy and another guy, another pool player. I seen him one time with Sonny Belk and then

from the on, I just talked to him when I met him, met him several times.

Q. Did you ever play cards with him before? A. I had played in one, I think one occasion with him.

Q. Well, you knew Tommy fairly well, is that correct? A. Well, met him on several occasions. I don't consider I knew him real well, but I met him on several occasions.

Q. Well, you knew him long enough to ask him to sit in and play cards for you to find out if another man was cheating or not, did you not? A. I knew he was a fairly capable card player.

Q. You knew him well enough to ask him to do that, didn't you? A. Yes, sir.

Q. And, in fact Tommy was at that game at your request, was he not? A. You could put it that way, but he was in on the helping setting it up to start with. Like he said he was at the card game at both of us' request, mine and Douglas.

Q. But you had asked him to come, had you not? A. Yes.

Q. To your knowledge had you ever heard Douglas ask him to come? A. I didn't hear him ask him.

Q. Did he introduce you to Douglas? A. No, sir.

Q. Woppy introduced you to Douglas, didn't he? A. That's right.

Q. Woppy wasn't there at the card game, was he? A. No.

Q. When you went to this card game on July the 6th, you went there to get your money back, didn't you? A. I went to play and if I caught him cheating I intended to get my money back, if I definitely caught him cheating.

Q. You went there to get even, did you not? A. I don't know what you mean by that.

Q. Well, the reason you were playing cards. The reason you went there was to get even, was it not? A. If I could win I went there to get even.

Q. And, you told your brother you wanted some help available, hadn't you? A. No, I said if I caught him cheating I was going to ask for my money back.

Q. That's all. You didn't say anything to your brother about b ·ging anybody there to help you? A. He mentioned he could bring some help if I thought I would need it.

Q. What did you tell him? A. I said that the man might not want to give my money back, but I intended to get my money back if I catch him cheating.

Q. So, you indicated to him you wanted him to bring help, is that right?

Mr. Sabella Objects: If your Honor please, that's not so. He's just stated what he said and did not say what the State attorney has stated.

Q. I think I have a right to cross-examine this man, your Honor.

Mr. Sabella: He's misquoting the answer, your Honor.

The Court: Alright, I'll overrule the objection.

Q. You let him know that you wanted him to bring the help, did you not? A. Well, if he wanted to.

Q. And, did you let him know that you wanted them to come armed? A. I didn't tell him—I didn't say whether to come armed or not.

Q. You didn't? A. No, sir.

Q. You didn't give any indication that they ought to come armed? A. I didn't say either way.

Q. You didn't say either way. So, you didn't know that there was going to be anybody there or that they were going to have guns or anything else, did you Mr. Wood? A. I figured that Joe would either have one on him or in the car.

Q. Let me ask you my question again. Did you know that Joe was going to be there with a gun? A. No, I didn't tell him to.

Q. You didn't tell him to. Did you know that he was bringing help and that the help was going to have guns? A. Not definitely.

Q. Not definitely. Well, had you told Joe to bring help and to bring them armed? A. No, sir.

Q. And, you did not know—it's your testimony under oath in this Court that you did not know that these people were going to be there or that they were coming with Joe. He never told you that these people were there and that they were armed? A. He said that some of his help would be with him, but I didn't know who or how many.

Q. Excuse me, your Honor. Let me hand you, if I might, what's been marked State's Exhibit "10", please. Is that the way your brother's hair looked on July the 6th? A. I really don't know.

Q. Well, let me hand you this photograph. Apparently dated July 8, 1970 and ask you which one of those two photographs looks more like the way your brother wore his hair before this incident. A. I don't remember either way. Three or four years he wore a crew cut. I just don't remember.

Q. You don't remember, is that your answer? Let me hand you two exhibits, "6" and "9" and ask you if your brother—look at your brother in those photographs. Do you notice anything unusual about your brother's mouth in the photographs? A. The picture is not very big and it looks like him.

Q. Let me ask my question again just so you will understand me. Do you notice anything unusual about your brother's mouth? Is that the way he usually holds his mouth? A. I don't know.

Q. You don't know. Did you tell any one of these male coloreds to search Bill Douglas after he was shot? A. No, sir.

Q. I have no further questions.

The Court: Mr. Stanton, any questions?

Mr. Stanton: No questions.

The Court: Alright.

Mr. Cassell: Your Honor, I'd like to have a few minutes recess.

Mr. Stanton: Let's get through with him, if we can.

The Court: Alright, let's finish him first.

Mr. Strother: I'd like if I could to have those photographs passed to the jury at this time, your Honor.

The Court: Alright, sir.

Mr. Strother: In light of this witness' testimony.

The Court: Alright, sir.

Mr. McKnight: I'd like to see them again too when they get through with them.

The Court: Alright.

Mr. Smith: James Randolph has no questions, your Honor.

The Court: Thank you, Mr. Smith.

Mr. Cassell: I think we've done a good job questioning him. I have nothing further, if it please the Court.

Mr. Sabella: Just one, your Honor.

Cross-Examination by Mr. Sabella

Q. Mr. Wood, did Wilbur Lee Pickens—do you know whether Wilbur Lee Pickens worked for your brother at any time? A. I don't think he did.

Q. That's all.

The Court: Alright, any further questions now from the defendant Robert Hugh Wood? Alright, have a seat back where you were, please, sir. Members of the jury, a recess has been requested. During it do not discuss it and remain together.

(Recess.)

The Court: Bring in the jurors.

Mr. Stanton: Robert Wood rests.

(Defendant Robert Woods rests.)

4. POLICE RECORD OF ISAIAH HAMILTON'S ORAL STATEMENT:

ORAL STATEMENT of ISAIAH HAMILTON, MN, 24, residence 647 Haynes, Apt. No. 3, no phone, occupation laborer, King's Upholstery, 2455 Summer Ave., made at Central Police Headquarters on Thursday, July 16, 1970 at 9:20 PM to Det. D. O. Lewis, Det. J. A. Dungan, Det. T.E. Merritt, and Lt. B. N. Linville.

ISAIAH HAMILTON was advised that he was under arrest and would be charged with MURDER IN CONNECTION with the FATAL SHOOTING of WILLIAM DOUGLAS, MW, 52, which occurred on Monday, July 6, 1970 at approximately 9:30 PM at 3403 Benbow Drive, Apartment No. 1. ISAIAH HAMILTON was advised that he did not have to make a statement, that he had the right to remain silent and that anything he said could be used against him in a court of

law. He was advised that he had the right to have a lawyer, either of his own choice or court appointed if he could not afford one, and to talk to his lawyer before answering any questions and to have him with him during questioning if he wished. ISAIAH HAMILTON was asked if he understood his rights and he stated he understood. He was asked, having these rights in mind, did he wish to talk to us and he stated he did.

ISAIAH HAMILTON stated:

That he worked with Joe Wood at his shop on Summer Ave. and Joe Wood told him that his brother Robert Wood, had been playing poker with a man and the man had been cheating him and taking his money. Joe Wood showed him where the apartment was that they were playing poker in and Monday afternoon Joe told him to find James Randolph and Wilbert Pickens and to meet him at the apartment. These apartments were on Winchester just west of Airways. He and Wilbert and Joe went over to the apartments and got there four or five minutes early and were circling around and then parked by the apartments. Joe came out and was playing with a little white dog and some people were walking by and they told him that the car was running hot and Joe got into the car with them and then went down to the Krystal on Winchester and got into Joe Woods 1967 GTO Convertible, yellow with a white top. The GTO had red and white dealer tags. Joe Wood stopped and got some beer and they went back to the apartment and were going to go inside and somebody looked out the window and asked, "Who is with you?" They planned to go in the apartment and rob everybody in the apartment, including Joe and Robert Wood so they could get Robert's money back.

When someone looked out the window and asked who was with Joe Wood, he and James Randolph and Wilbert Pickens went around the side of the apartment and got back in the

GTO. In just a few minutes Joe Wood came running out and told them to come there right quick, "I got them lyin on the floor." When they went to the door of the apt. they heard a shot and Joe kicked the door open and they rushed inside and a white man was lying in the floor. Robert Wood was standing there with a .22 stack barrel Derringer in his hand and said, "I had to shoot him cause he was goin in his pocket." There was another young white man in the apartment standing back by the closet. Robert Wood motioned for Wilbert Pickens to search the man on the floor and the young guy and Wilbert took a pocket knife off the young guy and $50. After this they went to his apartment and Joe Wood gave him a .20 gauge shotgun and Robert Wood gave him a .22 stack Derringer and a .22 revolver blank pistol and he put them in his attic along with a sawed off shotgun and a .38 pistol that Wilbert was carrying. Joe gave him and Wilbert and James $50 a piece and then left in the GTO. Robert Wood was driving a 1967 Plymouth, blue which had Mississippi license plates.

Wilbert Pickens fired one shot from the .38 pistol just after they bussed in the apt. door because he did not know Robert Wood and Robert was standing there with a pistol in his hand.

Isaiah Hamilton was shown B of I photograph No. 97971, and stated that this was a photograph of Wilbert Pickens. He was shown a group of six snap shots of male whites and identified a photograph of Thomas Edward Thomas as being the male white that was inside the apartment in the closet.

He was shown six B of I photographs of male whites and stated that No. 86928 was Robert Wood and No. 113870 was Joe Wood.

5. SIGNED STATEMENT OF ISAIAH HAMILTON

STATEMENT OF: ISAIAH HAMILTON, male Negro, age 24, residence 647 Haynes, apartment three (3), no phone,

occupation, laborer, King's Upholstery and Ace Auto Service, 2455 Sumner, made at Central Police Headquarters, Thursday, July 16th, 1970, 10:15 p.m., made to Detective J. A. Dungan and Detective D. O. Lewis.

Typed by: Jeanne Powers

Questioned by: Detective D. O. Lewis

ISAIAH HAMILTON, you are under arrest and will be charged with MURDER, this charge growing out of the shooting of WILLIAM DOUGLAS, male white, 52, one time in the chest with a small calibre pistol by ROBERT WOOD, on Monday, July 6th, 1970, at approximately 9:30 p.m., at 3403 Benbow Drive, apartment one.

You have the right to remain silent. Anything you say can be used against you in a court of law. You have a right to have a lawyer, either of your own choice or court-appointed, if you cannot afford one, and to talk to your lawyer before answering any questions and to have him with you during questioning, if you wish.

Q. Do you understand each of these rights I have explained to you? A. Yes, sir.

Q. Having these rights in mind, do you wish to talk to us now? A. Yes, sir.

Q. Isaiah, on Monday night, July 6th, 1970, at approximately 9:15 p.m., do you have knowledge of a shooting which occurred in an apartment on Winchester, just west of Airways? A. Yes, sir.

Q. Who was shot in this apartment on Winchester? A. I don't know the guy's name—he was a white man.

Q. Who shot this white man in the apartment? A. Robert Woods.

Q. What type weapon did Robert Wood shoot this man with? A. A .22 stack barrel Derringer—it was nickel plated.

Q. I will ask you to state in your own words how you happened to be at the apartments on Winchester when this shooting occurred and what action you took during this shooting, and the events that took place prior to and after this shooting.
A. I—Joe left me at the shop on Summer Avenue, and told me to find James and Wilbert Pickens, for me to meet 'em at the apartments at 9:00 o'clock the apartments on Winchester. I found Wilber at Michell's Restaurant at Hamilton and Lamar, and from der we went to James Randolph's house, and from der' we went to Big Mary's house where she was havin a picnic. We drank a few beers, den got in the car and went back out on Winchester to the apartments. Wait aminute, wait aminute, I left somethin' out. Before we went to the apartments, we come on over on Mallory to a girl's house over there, Daisy's all I know, and we left der and went on to the apartments. When we arrived to the apartments, we was four or five minutes early, so we circled around—so we was riding around. The car got hot on us and we got some water at a service station on Airways by the Xpress, den we went to de Liquor Store, and bought a pint of Smirnoff Vodka, and den we rode on out to the apartments and we was a little early, so we rode around until about a minute or two minutes till nine. At that time, we parked just down from the apartment where this happened, and at that time Joe Woods come out and started playin' with a little dog and some peoples come up walkin' and den after the peoples passed, he come on to the car, and den we told him about the car were runnin' hot and wouldn't start, it was hot, and he tol' us to carry him down to the Krystal to get his car—the car we was driving was a '68 Plymouth, rust colored kinda, or reddish brown, and den we got in his car, a '67 G.T.O. convertible, yellow with a white top with red dealer tags, and we come on back to the apartments. Before we came back to the apartments, Joe stopped at a store and bought a six pack of beer. He was drivin' Robert's '67 Plymouth, blue, had Mississippi license plates on it. And we was at the apartments 'for he got back, so he got

there and he tol' us to follow him in, and when he got to the do' for us to push him in, after they opened the door for 'em, but it didn't work that way, and someone looked out the window and spotted us with Joe, so dey asked Joe, "Who with you?" and Joe said, "Nobody." Den they asked three or fo' mo' times den me, Randolph and Wilbert went around the corner, to get out of sight and somehow or nother, Joe got in, he say he went in the window, but I didn't see him, so we went on to the car and we got in the car, and Wilbert say, "Let's go. Let's don't stay any longer." and about that time we was fixin' to go and Joe come out and said, "Two of y'all come here right quick." and Joe said, "I'm got 'em laying on the floor." When we got about to the door, we heard a shot, and somebody replied that Joe's brother had got shot, and den we went to the do' and Joe started kickin' on the do' and it was hard for 'em to kick down by hisself and Randolph and I helped him, and we went in, and one man was layin' on the floor and one was in the closet, and Robert was standin' over by de table where they had been playin' at, so Robert had a hand of money, that's all I seed, I don't know how much it was, and a .22 stack barrel gun in his hand, and Robert replied to James, "Search him—laying over der." meanin' the man that had been shot, and James searched 'em and got I think thirteen hundred dollars off 'em, and den we left the apartments and got into Joe's car, which was a '67 G.T.O. convertible—me, Wilbert and Randolph left. We went on out Brooks Road to Airways, out Airways to the X-Press, to Lamar, turned left on Lamar, come towards downtown to my apartment, 647 Haynes, apartment three (3), and dat's where they give us fifty dollars, and somebody replied that Robert shot the man, and Randolph give Joe the money and Joe gave us fifty dollars apiece—while they was countin' the money, I carried the guns up in the attick and hid 'em.

Q. Had you ever been to the apartment on Benbow Drive, which are off of Winchester before the night of Monday, July

6th, 1970? A. Yes, sir, I was der on July 4th, me, Joe, Wilbert, that's all. I mean James was there too.

Q. Why did you go there on July 4th? A. Joe wanted to go look at the place, wanted us to go look at the place.

Q. Did he tell you why he wanted you to go look at the apartment? A. Well, he said dat de man dat was gambling with his brother, had won a lot of money off his brother, and he said dat his brother would give us three or four hundred dollars apiece to take it back, meanin' to rob the whole bunch, him, his brother, the man and all of em.

Q. Did Joe Wood tell you that he would kill the man if it was necessary to get the money? A. Yes, sir, he did. He said, "I will kill him if I have to, cause I will be on the inside, and you won't have anything to worry 'bout."

Q. Did he tell you how the man was taking there money? A. He tried to explain it to me, but I just didn't know what he was talkin' about—they was playing poker, but I just didn't understand how he was takin' the money—I guess that he meant the man was cheatin.

Q. You stated that you were driving a '68 Plymouth when you, Wilber and James met Joe Wood at the apartment—who did this car belong to? A. Sims' Plymouth—that's a car lot on Bellevue.

Q. How many shots were fired at the apartments on Winchested? A. Two shots. I heard one while we was outside the apartment, and we, we, when we come in, Wilbert thought that Robert was goin' to shoot James, so Wilbert shot at Robert and the bullet went into the wall over the couch, and Robert was standing towards the big window, and it went over Robert's head.

Q. What type weapon was Wilbert armed with when he shot one time into the wall of the apartment? A. A .38 pistol.

Q. Were you armed with any type weapon when you went to the apartment? A. I was armed, but I left it in the car—when we went to the apartment door. I had a sawed off shotgun.

Q. Was James Randolph armed with any type weapon? A. I don't remember whether James had anything or not.

Q. Did Joe Wood have any type weapon? A. Joe Wood had a .38. He didn't have nothin' when he came out to de car to get us, at least it wasn't showin'—he might have had it in his pocket—and the front door was open and he say he seed a man across the apartment gettin' on the phone, and he said he went over and told the man to git off the man and he said the man axed him what was goin' on, and he said he tol' the man he didn't know what was goin' on right den, not to call nobody yet, and when he came back I saw he had a pistol in his hand; it was a big type pistol, looked like a .38.

Q. Why did Wilbert shoot at Robert Wood? A. I know Robert, James knows Robert but Wilbert didn't know 'em and Wilbert say he thought that was one of de men in der that had a gun, he said he thought the man, Robert, was fixin to shoot James.

Q. Was Robert Wood armed with any other type weapon besides the .22 stack barrel pistol? A. Yeah, he had that blank .22.

Q. Why do you say that Robert Wood shot the male white you saw lying on the floor inside the apartment? A. Cause him and another guy was the only two in there, and the youngest guy was in the closet, and Robert was standin' over back by the couch with a gun in his hand—the gun in one hand and the money in the other.

Q. When did the younger man come out of the closet? A. He come out the closet when Robert tol' him to come out.

Q. When he came out of the closet, was he armed with any type weapon which you saw? A. He had a pocket knife in his pocket. I could tell it was about that long (Indicating six

inches). He had on tight pants, and Joe had told us that he had one. He said watch him cause he could throw it real good.

Q. What type clothing did this man have on, that came out of the closet? A. It look like white levis', they were white pants, I don't remember what kind of shirt he had on.

Q. Where was the man lying that had been shot? A. He was laying head in the kitchen and his feet near 'bout in the living room.

Q. Did this man appear to be dead at this time? A. Naw, he wasn't dead. He was laying there gruntin', and I really didn't know he had been shot until Robert said, he had shot him. He said, "I had to shoot him cause he was going in his pocket."

Q. When did James go through the man's pockets? A. When we first come in, Robert motioned for him to go on and get his money and den he tol' Wilbert to search the other young guy, and Wilbert got the pocket knife and I think $50.00 off of him. I never seen a knife like that before, it was a fold up type with a brown handle.

Q. What did Wilbert do with the money he got off the young boy and what did James do with the money he got off the man that had been shot? A. When they got the money, I don't know whether he put it in his pocket, but when we got the money, we all run out de house, we left Robert and Joe, and the other guy in there.

Q. When did you next see Robert and Joe? A. We was on the X-press, we had turned onto the X-pressway, and was headed down toward Lamar, and they pulled up beside us in Robert Wood's car. We was in Joe's G.T.O.

Q. Did you have any conversation with Joe Wood and his brother, Robert, while in your cars on the expressway? A. Yes, they pulled up beside us, and axed us where we were going and I told 'em my apartment. They followed us on over to my apartment.

Q. Did Joe Wood and Robert Wood give you any type weapon while at your apartment? A. Yes, Joe Wood gave me a .20 gauge automatic shotgun, I think it was Joe, and Robert Wood give me a .22 stack barrel Derringer, nickel plated, and give me a .22 revolver, blank pistol—and that's the only thing he give me. I hid them in the attic.

Q. Besides the 20 guage shotgun, .22 Derringer, and the blank .22 pistol, what other weapons did you hide in the attic? A. That's all—I put the sawed off shotgun, the 20 guage shotgun, the .22 Derringer, Wilbert's .38, and the blank pistol—they was all in a bunch and I put 'em in the attic.

Q. I will show you six (6) snapshots, photographs, of male whites and ask you if you can identify the photograph of any of these male whites, and if so, where have you seen him? A. Yes, this one was the one I identified as comin' out of de closet.

Q. Did you place your name, date and time on the back of this photograph at 9:55 p.m., July 16th, 1970, indicating that you identified this photograph as the photograph of a man who came out of the closet? A. Yes, I think that was him.

Q. I will show you six (6) Bureau of Identification, Memphis Police Department, photographs of male whites bearing numbers 94653, 86928, 74144, 86927, 113870, 113854, and ask you if you can identify any of these male whites? A. Yes, 86928 is Robert Wood, and 113870 is Joe Wood.

Q. I will ask you if you placed your name, date and time on the back of photograph number 86928 and 113870, indicating that you had identified these photographs as being that of Robert Wood and Joe Wood, respectively? A. Yes.

Q. Did you unload any of these weapons after you arrived at your apartment? A. I unloaded the 20 guage automatic shotgun and I unloaded the 12 guage sawed off shotgun. That was all I unloaded. I just threw the shells into the park across the street from my apartment, down the street a little bit.

Q. What happened to the '68 Plymouth you left at the Krystal Drive In on Winchester? A. Me and Joe went back the next morning and got it, and carried it to the shop and cleaned it up, and returned it to Sims.

Q. Did Joe Wood's G.T.O. Pontiac remain at your house after the shooting? A. No, sir. Joe Wood took it with em' and Robert went in his car, and den we walked to Pendleton and Park to the Blue Dalhia Cafe, and gave a guy a dollar to carry us to Deadrick and Cella, and we walked to James' house and got in Wilber's car, and went back over to Big Mary's.

Q. How long have you know Joe and Robert Wood? A. I been known' Joe about eight year and I ain't been knowin' Robert since he been over on Summer and that's been about two or three years, something like that.

Q. Can you read and write without the aid of glasses? A. I don't need no glasses, I just can't read.

Isiah Hamilton, in view of the fact that you cannot read, this statement, consisting of three complete pages, and almost the completion of a fourth page, will be read to you by Detective W. C. Hylander, and if you find same to be true and correct to the best of your knowledge, you will be asked to initial all copies of the first three pages in the right hand corner, and sign your name on the line provided below.

/s/ Isiah Hamilton

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6. TESTIMONY OF DETECTIVE LEWIS REGARDING ORAL STATEMENT OF ISAIAH HAMILTON:

Q. Who was present at the time the statement was given? A. Myself, Detective J. A. Dungan, Detective T. E. Merritt and Lt. B. N. Linville.

Q. Would you tell the gentlemen of the jury what Isiah Hamilton told you? A. He stated that he worked on Summer Avenue and that a man there told him that another party had been playing poker with a man and that this man had been cheating him and taking his money. He stated that this party showed him where they were playing poker, that Monday afternoon, at some apartments over on Winchester just west of Airways. He told him to find two other parties and to meet him at the apartments at approximately 9:00. He drove over to the apartments on that day, Monday, got there a little early and circled around the lot and parked the car close to the apartments. He was joined a little bit later by this party. At this time, they told this party that the car they were driving was running hot and wouldn't start. At this time this party went with them up to the Krystal on Winchester and got his car which was a 1967 GTO convertible, yellow with a white top. While they went to get this car, they also stopped in a store and bought some beer. They returned back to the apartments. They were following this man back to the apartment at which time they got back to the apartment and someone looked out the window and asked who is with you. They asked this several times. At this time, Isiah and the other parties went around to the side of the building and returned to where they had the car parked. Just shortly, this party came out to the car and told them to come on quick and follow him, that he had them lying on the floor. At this time they got out of the car and followed this party back to the apartments and were going inside. Before they did, they heard a shot come from the inside of the partment at which time they tried to go in, found that the door was locked and began kicking on the door. The door was kicked open at which time they saw a white man lying on the floor on his back. There was also another party in there waving a .22 stack barrel gun. There was another party behind, beside a closet door behind the front door of the apartment. At this time they turned and ran back to the car and returned to Isiah Hamilton's apartment on Haynes at which time they were met by two other parties

who gave them some guns at which time Isiah Hamilton hid them in his attic.

Q. Is that the sum and substance of the statement that Isiah Hamilton gave you? A. Yes, Sir.

7. TESTIMONY OF LT. MERRITT REGARDING FIRST ORAL STATEMENT OF JAMES A. RANDOLPH:

Q. If you would, Detective Merritt, tell the jury what Mr. Randolph told you? A. He stated that on that Monday night after he got off from work and went home and he and his wife were preparing to go to the wrestling matches when a friend of his came by in a GTO convertible, wanted him to go with him. At this time he stated he didn't believe he would go, him and his wife were already getting ready, was going to the wrestling matches. This friend kept on and he decided then he would go with him and after going out to the car, he observed two more of his friends out there in the car. At this time, they left his home and started out on Winchester and in route they stopped and got a bottle of whiskey and after arriving at some apartments on Winchester where they parked the car, they sat there and drank. One of the friends got out and went in the apartment and came back out and in a few minutes later he started back in and at this time he heard a shot and he hollered ya'll come on. This friend ran up and kicked the door in. When they went in the apartment, they observed a man lying on the floor on his back and another man standing in the room with a shiny pistol in his hand.

Q. Is this the sum and substance of the statement he gave you? A. Yes, sir.

Q. Now, this statement we are referring to, is this an oral statement? A. It was an oral statement, yes, sir.

Q. That's all.

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8. TESTIMONY OF DETECTIVE LEWIS REGARDING SECOND ORAL STATEMENT OF JAMES A. RANDOLPH:

Q. Officer Lewis, if you would, tell the jury what James Randolph told you? A. James Randolph stated that on Monday, July 6, 1970 that he was at his home on Seller with another party at approximately 7:00 P.M. He stated that another party came to his home and that this party was in a '67 GTO Pontiac convertible and that this party tried to get him to go with him. Shortly after this party arrived, another party arrived in a maroon Plymouth. The party in the GTO convertible had told him that there was another party at some apartments on Winchester playing cards with another party and that this party was cheating this other party in the card game and taking his money. He stated that he wanted him to go to this apartment and stop the man from cheating and get the money back that had been taken and that the money was going to be taken even if he had to kill this man. He stated that, he told another party where the apartments were. James Randolph stated that he and two other parties went to the apartments on Winchester and upon arriving, another party came out of the apartment and got into the car with them and they went to the store and bought a six-pack of beer. They had already told this other party that the car they were occupying was running hot. This other party then told them, they then got into this other party's '67 GTO convertible and returned to the apartments. When they returned, they went to the apartment and for some reason the other party had to go into the apartment through a window. Shortly later they were joined by this party who came from the apartment and told them to follow him. They went back to the apartment, attempted to go in at which time they found the door to the apartment locked. They then heard a shot come from the inside of the apartment at which time this other party kicked the front door open and saw a man lying on the floor. There

was also another party that came from behind the front door out of a closet and saw another party standing in there waving a pistol. The party that was waving the pistol was taking money off of the table. At this time another party fired a shot into the wall to scare the other party that was waving the pistol. They then ran from the apartment and got into the '67 GTO convertible and went to another party's apartment at which time they were shortly joined by two other parties who gave them $50 a piece and also gave them some guns which were hid in another party's attic. James Randolph stated that he had a .38, another party had a .38 and another party had a saw off shotgun. He also stated that $1300 was taken from the apartment.

Q. Is that the sum and substance of the statement? A. Yes, sir.

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9. SIGNED STATEMENT OF WILBER LEE PICKENS:

Statement of WILBUR LEE PICKENS, MN 25, alias "Peabody", residence, 1347 Chadwick Circle, ph. 274-2673, occupation, unemployed, education, 10th grade, made at Central Police Headquarters on Saturday, July 18, 1970, at 8:25 a.m. to Det. R. N. Stratton and Det. J. C. Peel.

Questioned by: Det. R. N. Stratton.

Typed by: O. Molenaar

WILBUR LEE PICKENS, you are under arrest and will be charged with MURDER, this charge growing out of the shooting of WILLIAM DOUGLAS, male white, age 52, one time in the chest with a small caliber pistol by ROBERT WOOD, on Monday, July 6, 1970, at approximately 9:30 p.m., at 3403 Benbow Drive, Apt. 1. You have the right to remain silent. Anything you say can be used against you in a court of law.

You have a right to have a lawyer, either of your own choice or court-appointed, if you cannot afford one, and to talk to your lawyer before answering any questions and to have him with you during questioning, if you wish.

Q. Do you understand each of these rights I have explained to you? A. Yes, sir.

Q. Having these rights in mind, do you wish to talk to us now? A. Yes, sir.

Q. Wilbur, on Monday night, July 6, 1970, at approximately 9:15 p.m., do you have knowledge of a shooting which occurred in an apartment on Winchester just west of Airways? A. Yes, sir.

Q. Who was shot in this apartment on Winchester? A. It was a white man, and I think his name was Douglas.

Q. Who shot this white man in the apartment? A. Robert Wood is all I know.

Q. What type weapon did Robert Wood shoot this man with? A. It looked like a .22 duringer. It was shiny and had white handles.

Q. I will ask you to state in your own words how you happened to be in the apartment on Winchester when this shooting occurred, and what action you took during this shooting, and the events that took place prior to and after this shooting. A. I was over at James Randolph's house, I went over there to see his sister-in-law, Edna Mae Boxly. James was there. That was about 7:30 p.m., Monday, July 6, 1970, when Isaiah Hamilton came over. He was in a brown Roadrunner, with Mississippi license number, and I got in and I drove around the block and brought it back. And then Isaiah came out and said, "Let's go over to Mary's picnic," and I told him, "O.K." and then we went over to some girls' house on Lauderdale and Mallory. Her name was Daisy and she lives on Mallory, and we stayed over

there bout half an hour drinkin, we were havin a beer up there. And then we left there and went to Mary's place, her house is on Boyle, I think. And we stayed there bout 25 minutes. And then Isaiah and James and myself left there. We came to Winchester and Airways, we went to this apartment on Winchester where the shooting happened. When we got to the apartment, Joe Wood came out and said he was goin to get some beer. So Joe Wood told us to trail him up to the Krystal behind his car, it's on Winchester. And James and I and Isaiah, we got in Joe's car, after we got to the Krystal. We left the Roadrunner there at the Krystal because it was runnin hot. When we was on the way to the Krystal, Joe stopped at the drive-in grocery store and got some beer, and then he drove on over to the Krystal where we were. The drive-in grocery store was right beside the Krystal on the same side of the street. Joe and Isaiah and James and I went back to the apartment and parked out there in the parking lot. Joe got out and went to the front door with a little dog in his arms, it was just a little white dog. And he knocked on the door. Someone said, cause I couldn't see inside, "Joe, do you have someone with you?" Joe told em no, he didn't have anybody. Then the person said, "Yes, you is, because I saw em." And then we went back to the car, James and I and Isaiah went back to the car, and we set in the car. Then when we got back to the car, someone let Joe and the dog in through the window. It was a window by the front door. Then about five minutes later, Joe came round to the side of the apartment, and said uh, "Come here two of youall," and then Isaiah and James jumped out of the front seat of the car, and Joe told Isaiah and James, "I think they're gonna hurt my brother." Isaiah, James and I all jumped outa the car. Isaiah had a sawed-off shotgun, James had a pistol, I think it was a .22, and I had a .38 revolver. We all ran to the door. Just before we got to the door, we heard a shot inside the apartment. Joe Wood tried to kick the door down, but he couldn't, so James and Isaiah and Joe all three kicked the door

down. And Joe went in first, James was next, Isaiah was next. I was last. I looked and saw a man layin on the floor on his back. There was another man who I later learned was Robert Wood, standin there with a .22 duringer, and he turned around and was pointin it towards the door, and I was standin in the door. I fired the .38 toward the wall. I fired kinda up and back to my right. Joe said, "Uh uh" just like that, and I turned and went back out the door to the car. Before I went out the door to the car, I saw a man come outa the closet. This closet was to the left of the front door. When he come outa the closet, I saw somethin stickin out of his pocket and I thought it was a gun, and I asked him what it was. He just reached down in his pocket, he just reached down there and pulled it out. It was a long black pocket knife, with a blade about that long (indicating about six inches). There was some money with it when he pulled it outa his pocket. He just reached it to me, and I took it. I went back out the door then to the car. Then James and Isaiah came around the corner running, and Joe Wood and Robert Wood came out the back door. We came back out and got in Joe Wood's car. Robert Wood and Joe Wood got into a blue Plymouth. We still had the guns that we had when we went in the apartment. Then we left and went down Winchester to Airways and we turned on Airways toward Lamar, and then we got on the expressway and went to Lamar, got off the expressway on Lamar and went to Orange Mound on Cella. That's where they let me out at. I left the pistol layin on the console in Joe's GTO. And then I went home, got in my car and went home. That's bout it.

Q. Wilbur, can you describe the man who came out of the closet in the apartment on Winchester? A. He was tall, probably taller than I am. He was white. He was wearin white pants and a black shirt. He had dark hair, and I believe he had a mustache, but I'm not for sure.

Q. Wilbur, I will show you a group of six photographs, and ask you if you can identify any of these as the male white you

saw come out of the closet in the apartment on Winchester, and also if you can identify any of the other male whites, and if so I will ask you to sign your name on the back of these photographs. A. One of these men is Joe Wood. The man with the white pants on and the long-sleeved shirt and that has long hair, I believe is the man that came out of the closet in the apartment on Winchester the night of the shooting. I don't know any of the other four.

Q. Wilbur, I will ask you to relate all the activities that you observed of all the people that were in the apartment on Winchester on July 6, 1970. A. Isaiah was standin by the wall, and he stood by the wall all the time with the shotgun. James went over to the man that was layin on the floor and shook him down, meaning he searched him. I don't know what he took offa him. Robert and Joe both had hands full of money. Robert was gettin the money and the cards off the table. I didn't see anything but $100 bills. It was more money than I'd ever seen. The white man that come outa the closet didn't do anything but talk to Robert. He told Robert, he said, "I didn't think you would do us like that." And Robert told him, he said, "My family is bigger than yours." That's all I heard.

Q. When did you learn that the male white you saw in the apartment with the .22 derringer was Robert Wood? A. After we came outa the apartment and was drivin along, James told me that he was Robert Wood, Joe Wood's brother.

Q. What was your purpose for being at 3403 Benbow Drive, Apt. 1, on the night of July 6, 1970. A. Joe Wood had left word with Isaiah for James, Isaiah and I to meet him there at 9 o'clock that night. Joe Wood had planned for us to—I'll put it like this—rob the poker game.

Q. When were these plans made, and who was supposed to be in on the plans? A. It was about a week and a half before Monday, July 6th. Joe had asked James and I about stickin up

Joe Wood, himself, and his brother, Robert Wood, in order to rob this other man who was gonna be in the game. Joe Wood was supposed to come out the door at 9 o'clock the night of the game, and we was supposed to be there. He was supposed to come on in and hold the game up, but we was parked in the lot, we wasn't there. Joe Wood came to the car and asked us what happened, and we told him we didn't know whether or not to bother the game or not. When Joe Wood first talked to us about robbin the poker game, he brought James and I by the apartment on Winchester and showed us which one it was. We was in a blue '67 Chevrolet. We didn't go back any more till the night of the shooting.

Q. When the plans were made to rob the poker game, was there any mention of shooting the man? A. No, sir, Joe Wood said that there would be no kind of harm in it, just walk in and take everybody's money, so that man wouldn't think that the people playin had anything to do with it.

Q. When you entered the apartment, where was the man lying that had been shot? A. He was layin on his back in the doorway of the kitchen, with his head in the kitchen.

Q. Did this man appear to be dead at this time? A. No, sir, he didn't. He was breathin—gaggin, real hard. He wasn't movin, period.

Q. Did you hear Robert Wood make any statement after you entered the apartment? A. He motioned his head for James to search the man on the floor, and then I heard Robert tell Joe, he said he wouldn't stand still, he was zig-zaggin around the room, he said he was tryin to get in the kitchen and he had to shoot him, because that's why he was layin middleways in the doorway.

Q. Have you seen Robert or Joe Wood since the night of the shooting on Winchester? A. I haven't seen Robert, but I did see

Joe. About two days later I saw Joe, and he said that he was gonna turn hisself in.

Q. When Joe Wood come out the back door of this apartment after the shooting, did you observe any type weapon in his possession? A. I saw a shotgun in his hand. It looked like a automatic or a pump, it wasn't no single-shot.

Q. Prior to this shooting, when you, James, Isaiah got into Joe Wood's car on the Krystal lot on Winchester, were you armed with any type weapon? A. After we parked the car, I had a .38, I think James had a .22, Isaiah had a sawed-off shotgun, we took em outa the Roadrunner and put em in the GTO.

Q. Did you receive any money for your involvement in this robbery? A. Uh, no, sir, I didn't get any money.

Q. What did you do with the money and the long knife that you took off the male white that was hiding in the closet? A. I gave the money to James, and I throwed the knife away up there on Airways and the expressway.

Q. I will show you ten Memphis Police Department mug shots of male Negroes, these photographs bearing numbers 75010, 89466, 92587, 113179, 87018, 107537, 32051, 84883, 92155, and 85894. I will ask you to look at these photographs and see if you can identify any of these parties and if so

/s/ Wilbur Pickens

10. REDACTED STATEMENT OF PICKENS, READ DURING TESTIMONY OF DETECTIVE STRATON

(Reading of Written Statement by Detective Straton)

"Statement of Wilbur Lee Pickens, male Negro, 25, alias Peabody, residence, 1347 Chadwick Circle, phone 274-2673. Occupation, unemployed, education, tenth grade. Made at Central

Police Headquarters on Saturday, July 18, 1970 at 8:25 AM to Detective R. N. Straton and Detective J. C. Peel. Questioned by Detective R. N. Straton, typed by O. Molenar. Wilbur Lee Pickens, you are under arrest and will be charged with Murder. This charge growing out of the shooting of WILLIAM DOUGLAS, male white, age 52, one time in the chest with a small caliber pistol on Monday, July 6, 1970, at approximately 9:30 AM at 3403 Benbow Drive, Apartment No. 1. You have the right to remain silent. Anything you say can be used against you in a Court of law. You have a right to have a lawyer either of your own choice or Court-appointed if you cannot afford one and to talk to your lawyer before answering any questions and to have him with you during questioning if you wish.

Q. Do you understand each of these rights I have explained to you? A. Yes, sir.

Q. Having these rights in mind, do you wish to talk to us now? A. Yes.

Q. Wilbur, on Monday night, July 6, 1970, at approximately 9:15 PM do you have knowledge of a shooting, which occurred in an apartment on Winchester just west of Airways? A. Yes, sir.

Q. Who was shot in this apartment on Winchester? A. It was a white man and I think his name was Douglas.

Q. What type weapon was this man shot with? A. It looked like a .22 Daringer. It was shiny and had white handles.

Q. I will ask you to state in your own words how you happened to be in the apartment on Winchester when this shooting occurred and what action you took during this shooting and the events that took place prior to and after this shooting. A. I was over at a guy's house. I went over there to see his sister-in-law. He was there. That was about 7:30 PM Monday, July 6, 1970. When another guy came over. He was in a brown Roadrunner with Mississippi license numbers and I got in and drove

around the block and brought it back and then a guy came out and said, 'Let's go over to Mary's picnic' and I told him OK and then we went over to some girl's house over on Lauderdale and Mallory. Her name was Daisy and she lives on Mallory and we stayed over there about half an hour drinking. We were having a beer over there and then we left there and went to Mary's place. Her house is on Boile I think and we stayed there about twenty-five minutes and then we left there. We came to Winchester and Airways. We went to this apartment on Winchester where the shooting happened. When we got to the apartment a guy came out and said he was going to get some beer. So, he told us to trail him up to the Krystal behind his car. It's on Winchester and we got in his car after we got to the Krystal. We left the Roadrunner there at the Krystal because it was running hot. When we was on the way to the Krystal the guy stopped at the drive-in grocery store and got some beer and then he drove on over to the Krystal where we were. The drive-in grocery store was right beside the Krystal on the same side of the street. We went back to the apartment and parked out there in the parking lot. One guy got out and went to the front door with a little dog in his arms. It was just a little white dog and he knocked on the door. Someone said, cause I couldn't see inside, 'Do you have someone with you?'. He told them no, he didn't have anybody. Then the person said, 'Yes, you is because I saw them' and then we went back to the car. We went back to the car and we sat in the car. Then when we got back to the car someone let the guy and the dog in through the window. It was a window by the front door. Then about five minutes later the guy came around to the side of the apartment and said, 'Come here two of you all' and then the other guys jumped out of the front seat of the car and he told them, 'I think they are going to hurt a fellow'. We all jumped out of the car. One guy had a sawed off shotgun. One had a pistol. I think it was a .22. I had a .38 revolver. We all ran to the door. Just before we got to the door we heard a shot inside the apartment. One guy tried to kick the door down, but he couldn't.

So, the other three guys kicked the door down. I went in last. I looked and saw a man lying on the floor on his back. There was another man standing there with a .22 Daringer and he turned around and was pointing it towards the door and I was standing in the door. I fired the .38 towards the wall. I fired kind of up and back to my right. One guy said, 'nuh-huh', just like that and I turned and went back out the door to the car. Before I went out the door to the car I saw a man come out of the closet. This closet was to the left of the front door. When he came out of the closet I saw something sticking out of his pocket and I thought it was a gun and I asked him what it was. He just reached down in his pocket, he just reached down there and pulled it out. It was a long black pocket knife with a blade about that long (indicating about six inches). There was some money with it when he pulled it out of his pocket. He just reached it to me and I took it. I went out the door, then to the car. The two others came around the corner running and two others came out the back door. We came back out and got in the car. The other two got into a blue Plymouth. We still had the guns that we had when we went to the apartment. Then we left and went down Winchester to Airways and we turned on Airways towards Lamar and then we got on the expressway and went to Lamar, got off the expressway on Lamar and went to Orange Mound on Seller. That's where they left me out at. I left the pistol laying on the console in the GTO and then I went home—got in my car and went home. That's about it.

Q. Wilbur, can you describe the man that came out of the closet in the apartment on Winchester? A. He was tall, taller than I am. He was white. He was wearing white pants and a black shirt. He had dark hair and I believe he had a mustache, but I'm not for sure.

Q. Wilbur, I will show you a group of six photographs and ask you if you can identify any of these as the male white you saw come out of the closet in the apartment on Winchester and also if you can identify any of the other male whites and if so

I will ask you to sign your name on the back of each photograph. A. The man with the white pants on and the long sleeved shirt and that has long hair, I believe is the man that came out of the closet in the apartment on Winchester the night of the shooting. I don't know any of the other four.

Q. Wilbur, I will ask you to state all the activities that you observed of all the people that were in the apartment on Winchester on July 6, 1970. A. One guy was standing by the wall and he stood by the wall all the time with a shotgun and another guy went over to the man that was lying on the floor and shook him down (meaning he searched him). I don't know what he took off of him. The other two both had hands full of money. One was getting the money and the cards off the table. I didn't see anything but hundred dollar bills. It was more money than I had ever seen. The white man that came out of the closet didn't do anything but talk to one guy. He told him, he said 'I didn't think you would do us like that' and the guy told him, he said, 'My family is bigger than yours'. That's all I heard.

Q. What was your purpose for being at 3403 Benbow Drive, Apartment No. 1 on the night of July 6, 1970? A. A guy had left word with another guy for three of us to meet him there at 9:00 that night. A guy had planned for us to—I'll put it like this, to rob the poker game.

Q. When were these plans made and who was supposed to be in on the plans? A. It was about a week and a half before Monday, July the 6th. A guy had asked two of us about sticking up him and another guy in order to rob this other man that was gong to be in the guy. One guy was supposed to come out the door at 9:00 the night of the game and we were supposed to be there. We were supposed to come on in and hold the game up, but we was parked in the lot and we wasn't there. A guy came to the car and asked us what happened and we told him we didn't know whether or not to bother the game or not. When the guy first talked to us about robbing the poker game he brought two of us by the apartment on Winchester and

showed us which one it was. We was in a blue '67 Chevrolet. We didn't go back there any more until the night of the shooting.

Q. When the plans were made to rob the poker game, was there any mention of shooting the man? A. No, sir. The guy said that there would be no kind of harm in it. Just walk in and take everybody's money so that man wouldn't think that the people playing had anything to do with it.

Q. When you entered the apartment where was the man lying that had been shot? A. He was lying on his back in the doorway of the kitchen with his head in the kitchen.

Q. Did this man appear to be dead at this time? A. No, sir, he didn't. He was breathing, gagging real hard. He wasn't moving period.

Q. Did you hear a man make any statements after you entered the apartment? A. He motioned his hand for one of us to search the man on the floor and then I heard one guy tell another guy, he said he wouldn't stand still, he was zig zagging around the room. He said he was trying to get in the kitchen and he had to shoot him because that's why he was lying middleways in the doorway.

Q. Have you seen two of the persons since the night of the shooting on Winchester? A. I haven't seen one of them, but I did see the other. About two days later I saw one guy and he said that he was going to turn himself in.

Q. When the guy came out the back door of this apartment after the shooting, did you observe any type weapon in his possession? A. I saw a shotgun in his hand. It looked like an automatic or a pump. It wasn't no single shot.

Q. Prior to this shooting, when you got into the car on the Krystal lot on Winchester were you armed with any type weapon? A. After we parked the car I had a .38. I think one guy had a .22 and another guy had a sawed off shotgun. We took them out of the Roadrunner and put them in the GTO.

Q. Did you receive any money for your involvement in this robbery? A. Uh, no, sir, I didn't get any money.

Q. What did you do with the money and the long knife that you took off the male white that was hiding in the closet? A. I gave the money to a guy and I throwed the knife away up there on Airways and the expressway."

(Conclusion of Reading of Statement)

11. TESTIMONY OF THOMAS EDWARD THOMAS

The said witness having been first duly sworn, testified as follows:

Direct Examination, by Mr. Strother

Q. For the record would you please state your name? A. Thomas Edward Thomas.

Q. And, Mr. Thomas, where do you live? A. Fort Worth, Texas.

Q. Mr. Thomas, what is your address in Fort Worth, Texas? A. Well, it's right in between Fort Worth and Dallas. It's Grapevine, Texas, Rural Route 2, Box 42AA-1.

Q. Thank you. Mr. Thomas, were you in Memphis on July 6, 1970? A. Yes, sir.

Q. When had you come to Memphis? A. Oh, several weeks previous to that.

Q. Several weeks prior to July 6, 1970? A. Yes.

Q. Did you know a Walter Gaddy? A. Yes, I did.

Q. Did you know a William Douglas? A. I met him after I was here for a week or so.

Q. Did you know a Robert Wood? A. Yes, I did.

Q. Did you know a Joe Wood? A. No, I did not.

Q. Did you meet a Joe Wood? A. Yes, I did.

Q. On July 6, 1970, where were you staying here in Memphis? A. Barbara King Howell's apartment.

Q. On that date, did you have an occasion to go to the apartment of Walter Gaddy? A. Yes, I did.

Q. And, under what set of facts and circumstances did you go to that apartment? A. I went down there to watch a poker game.

Q. And, do you know or do you recall at whose request you went to watch that poker game? A. Robert Wood asked me to go down and Bill Douglas both.

Q. They both had asked you to come watch the poker game. A. Yes, sir.

Q. Did you go to that apartment? A. Yes, I did.

Q. Approximately what time did you arrive there? A. Early part of the evening, like 7 or 8:00, 6:30, I don't know.

Q. Somewhere early in the evening? A. Yes, that's correct.

Q. And, who was there when you arrived there? A. Bill Douglas and Robert Wood and his borther, Joe Wood.

Q. Just so that we will know who we are talking about, if I might, I'd like to hand you what's been marked State's Exhibit "1" and ask you if you can identify that. A. William Douglas.

Q. I'll ask you to look around the Courtroom and tell us if you see Robert Wood and Joe Wood. A. I see Robert Wood over in the corner. Let me put my glasses on here a minute. That may be Joe Wood with his glasses on, I'm not sure.

Q. Does that appear to be the person that you knew as Joe Wood? A. Seems to be.

Q. Alright, was the party who was there introduced to you as Joe Wood? A. Yes.

Q. Did a card game take place in that apartment? A. Yes, it did.

Q. And, will you tell these gentlemen what happened, what occurred on July the 6th, from the time you arrived at that apartment until you left? A. At the time I got there Robert Wood and Bill Douglas had decided to go buy some playing cards. So, we went to a department store and they purchased some plastic playing cards. The idea being that plastic cards would be the safest to play with. They could set them on the table and play a game of head-up poker meaning that Robert Wood and Bill Douglas would play each other. The game—they took out, oh, several thousand dollars and began playing poker and——(interrupted)

Q. Excuse me, but do you know how many thousands of dollars? A. No, I mean, over a thousand dollars each.

Q. Over a thousand dollars each? A. Yes, sir.

Q. Alright and they started playing poker, is that correct? A. That's correct.

Q. And, do you recall what type of poker they started playing? A. Low-ball.

Q. And, for gentlemen who are as ignorant as myself, would you tell us what that is? A. Well, that being just the opposite of high-hand poker. The low hand wins. In other words, the worst hand is the best hand.

Q. And, how many cards would you play with in this type of game? A. Well, it's just like seven card stud high, only this time it's low. You play the same amount of cards.

Q. That would be seven cards? A. Seven altogether.

Q. And, do you have to play all seven cards or do you play ——(interrupted) A. The best five out of seven.

Q. The best five and that's the game they were playing, is that correct? A. That's right.

Q. And, what type of game was this? A. It was a table stacks, no limit game.

Q. What does that mean? A. That means when both players take out a certain amount of money they can bet however much money they have in front of them until one of them loses how much they have. You cannot go to your pocket and take out more money after a hand is being played.

Q. And, this was, if I might say, this was a serious game of poker. A. Yes, it was.

Q. I mean this wasn't like some of these gentlemen might play at their house on a Saturday night with friends, that's what I'm trying to say. A. Yes, that's correct.

Q. And, what happened then? A. Well, they began playing and Bill Douglas began winning most all the hands and after the game had been played for thirty minutes or so Joe Wood had been drinking a little beer and asked me if I wanted to get some more. They had bought some after they got the cards and some milk and brought it over to the game and Joe said, come on, let's get some more beer. I told him I wanted to watch the game. So, he left and I continued to watch the game and Bill Douglas continued winning and I heard a knock on the door and I looked out the window a little later and I thought I saw somebody standing outside the door, more than just one person. I wasn't sure. So, at this time I said, well, it looks like it might be a heist. Somebody is outside. I don't know. So, Bill Douglas then jumped up and pulled a pistol and said nobody move, walked back into the bedroom and grabbed a shotgun, brought the shotgun out and held the pistol in one hand and the shotgun in the other hand like he wanted to open the door. I don't know if he said open it or not, he just said be careful. So, at that time they went up to the door and kind of looked out the win-

dow, couldn't see anybody but Joe Wood. At this time——(interrupted)

Q. Excuse me for interrupting you, but if I might, had any precautions been taken inside the apartment? Was there anything unusual that you wouldn't find in a normal apartment as far as precautions? A. That's correct. The back door in the kitchen was barricaded with lumber, two by fours and there was a two by four wedged up against the front door under the door handle.

Q. And, now, I believe you said that Joe Wood had left the apartment, is that correct? A. That's correct.

Q. And, he has knocked at the door, is that correct? A. That's correct.

Q. And, you looked out the door and you thought you saw more people than just Joe Wood there, is that correct? A. I thought so, yes.

Q. And, what happened then? A. Well, Bill looked out the window, Bill Douglas and said, well, there's nobody out there and I told him well, I can't be sure. I thought there might be. So, at that time he opened a sliding window next to the door and let Joe Wood come inside.

Q. Did he—this is making him crawl through a window? A. Crawl through a window.

Q. And, did Joe Wood get back inside? A. Yes, he did.

Q. What happened then? A. Joe Wood said some people had walked by at that particular time and that there was nobody waiting at the door with him. Bill then looked at me and said we had everybody scared and just kind of laughed.

Q. And, what happened then? A. They continued playing poker, but Bill looked over at the boy and said, let's finish this poker game.

Q. What did he do with his shotgun? A. I think he put it back in the bedroom.

Q. And, did he leave his pistol out? A. Oh, I think he stuck it in his pants.

Q. Did you see where he put his pistol? A. Well, in his pocket or——(interrupted)

Mr. McKnight Objects: Please the Court, he's leading, your Honor.

The Court: Don't lead him, General.

Q. I don't know of any less leading question that I can ask except—— (Interrupted) A. I can't swear where he put his pistol.

Q. You don't know what he did with the pistol? A. No.

Q. Alright, was the poker game resumed at that time? A. Yes, it was.

Q. And, were they playing cards again? A. Yes, they were. They just started.

Q. And, what happened then? A. Joe Wood got up and went to the restroom, walked back and pulled out some type of pistol.

Q. And, what did he do with that pistol? A. He pointed it at Mr. Douglas and asked him to get up.

Q. What happened then? A. Well, then he pointed it at me and said, lay down on the floor.

Q. And, what did you do? A. Laid right down on the floor.

Q. And, what happened then? A. Well, then he asked Douglas to get up or something and Douglas—I don't know, there was some type of argument or something there, I don't know what happened and then Joe Wood jumped over me and handed Robert Wood the gun and ran out the door.

Q. And, Joe Wood went out the door, is that correct? A. That's correct.

Q. Is the door opened or closed at this point? A. At this point the door is open.

Q. And, the door is open. A. That's correct.

Q. And, what happened then? A. Robert was standing there and I looked up at him and said, Robert—— (Interrupted)

Q. While Robert is standing there does he have anything? A. Yeh, he's got the gun.

Q. And, what's he doing with it? A. Just holding it in his hand. He's not pointing it at me.

Q. At you? A. No.

Q. And, what happened then? A. I looked up and said, Robert, you're making some kind of mistake or something. I don't know what the idea is here and as I started talking to him he didn't look like he was going to shoot me, so I just stood right up.

Q. And, what did you do then? A. Told him, I said Robert, I don't know what's going on. I just reached over and locked the door, shut and locked the door.

Q. Shut and locked the door at that time? A. Yes.

Q. And, what happened then? A. I turned to lock the door and I saw Bill Douglas make some kind of move. I don't know and as I turned to lock the door I heard a shot go off.

Q. You heard a shot go off? A. Yes.

Q. And, who was in the room at this time? A. Robert Wood, myself and Bill Douglas.

Q. And, did Bill Douglas have any gun in his hand? A. I couldn't say if he did or not.

Q. Did you have any gun in your hand? A. No, I did not.

Q. Did Robert Wood have a gun in his hand? A. Yes, he did.

Q. And, you heard a shot go off? A. I heard a shot go off.

Q. What type of gun did Robert Wood have in his hand? A. Some type of small caliber gun. I don't know for sure.

Q. Was it a large gun or small gun or a medium size gun? A. Oh, small gun.

Q. What happened then after the shot? A. Well, the door was kicked opened and another shot was fired, another two shots, I don't know how many.

Q. What happened to you when the door was kicked opened? A. I was kicked behind the door.

Q. And, you heard a shot and what happened then? A. And, then several Negroes came into the room and one of them grabbed me from behind the door and looked like he was going to swing a pistol at my head and Robert Wood said, don't hit that boy and he looked over at me and said, stand over there or something to that effect, I don't know. And, then everything was just happening, everybody was running around or something, I don't know. At that time I was scared I was lucky to know where I was.

Q. Alright, did anything happen to you personally? A. No, they didn't hurt me in any way.

Q. Did they take anything from you? A. I had a pocket knife in my pocket, bulging in my pocket and one of the Negroes asked me, said, what's that in your pocket there and I reached in and just pulled it out and gave it to him.

Q. Did they take anything else from you? A. Well, I had some twenty dollar bills in there and I think they came out with the knife.

Q. And, did they take those from you? A. I think I handed them both together.

Q. And, they took—do you remember how much you had in twenty dollar bills? A. No, I really don't, $60, $80, I don't know how much.

Q. And, what happened then? A. And, then everybody ran outside the door and I ran over and looked at William Douglas to see if he was alright and it was obvious that he wasn't. He was hurt bad and I went next door and told them to call an ambulance and the police.

Q. At the time that this all occurred, was there money on the table where they were playing cards?

Mr. McKnight objects: Your Honor, I'll waive an objection in this matter. I do have an objection as to all of this taking place in the absence of Joe Wood being present, but I'll reserve my objection so that when the proper time comes I'll make my objection out of the presence of the jury, but for the sake of brevity, I'll let him go ahead at this point.

Mr. Sabella objects: And, I'm going to object to the leading questions, your Honor.

The Court: Try not, General, to lead him. I'm sure you can.

Q. Yes, your Honor. Directing your attention back to the point at which you testified Joe Wood came out of the bathroom and had a pistol in his hand. Was there or was there not money on the table where they were playing cards at that time? A. There was.

Q. And, was it a small amount of money or a substantial amount of money? A. Well, substantial, I guess. I don't know how much at that time. They had been winning and losing and taking out some more money, I think. I don't know for sure.

Q. Alright, now, you've reached a point, I believe, where you are left alone in the apartment. A. That's correct.

Q. With William Douglas, is that correct? A. That's correct.

Q. And, you go to William Douglas, is that true? A. I ran over to him, yes.

Q. I believe you've already testified to that and at that time was there any money on the table or anywhere in that apartment that you saw? A. I don't know if there was or not. I was not looking for money at that time.

Q. Did you take any money from the apartment with you? A. Did I take any?

Q. Yes. A. No, I did not.

Q. And, your knife and your money had been taken from you, is that correct? A. Yes.

Q. And, where did you go from there? A. I went next door and told them to call an ambulance and the police.

Q. And, what did you do then? A. I ran down to a place I was staying, this apartment right down the street.

Q. Whose apartment was that? A. Barbara King Howell's.

Q. And, when you got there was there anyone there at that apartment? A. Yes, there were two girls there.

Q. And, was anyone else there? A. Barbara King Howell.

Q. And, do you know the name of the two girls that were there? A. No, I do not.

Q. Had you known either of those two girls before? A. I had seen one of them previously.

Q. Had you—do you recall when you saw one of them previously? A. I think at a hairstyling place. I think she worked there.

Q. Had you ever seen them at the Benbow Apartments? A. The Benbow Apartments?

Q. Yes. A. No. Oh, is that the apartments Barbara lived in?

Q. No, that's the apartment that the Gaddy's lived in. A. Oh, yes, I saw them there two or three days before.

Q. And, what happened, what occurred when you saw them there? A. They were just walking by and Bill Douglas was there and I said—they walked us to the door and I said this is Bill Douglas.

Q. At the time that you reached Barbara King Howell's apartment, what kind of condition were you in? A. Oh, torn up a little bit from jumping a few fences.

Q. Had you—when you say torn up a little bit, I wonder if you could give us a little more detail of what you mean by that? A. Well, I ripped my pants and cut my hand.

Q. So, you were cut up when you got to the apartment, is that correct? A. That's correct.

Q. And, what happened after you arrived at the apartment? A. I told these two girls that were there to leave and called a friend of mine.

Q. And, who did you call? A. Sonny Belt.

Q. And, what happened then? A. Sonny came over and we started talking and about that time the phone rang or something and I think it was one of the Wood boys that called and said that they wanted to stop by or something——(Interrupted)

Mr. Sabella Objects: If your Honor please, unless he answered the phone maybe and talked to that person, I don't see how he is competent to testify as to who called.

Q. Did you talk to that person on the telephone? A. Yeh, but I think Barbara answered the telephone.

Q. Barbara answered the telephone, but did you talk to the party on the phone? A. I don't remember if I did or not.

Q. Alright, subsequent to that telephone call, what happened then? A. Sometime right in there Walter Gaddy came

by and I told him that William Douglas had been shot in his apartment and that the best thing he could do would be go on down there.

Q. And, what happened then? A. He left.

Q. Alright and what happened after that? A. There was a knock at the door and Barbara went to the door and said it's the Wood brothers and I said, well, hold it just a minute and Sonny, he left out of the back door and Barbara let them in. Joe came on in first.

Q. Alright, did both of them come in or just one of them? A. Both of them. Robert followed a little, maybe a minute or two later, I don't know.

Q. Alright and what happened? A. Joe came on in and said, say, now, just to keep anybody from getting in any trouble here, involving everybody, let's just say three Negroes came in this apartment down there where the poker game went on. I said, that's fine.

Q. And, did they say anything else? A. Robert came in and kind of implied—I told him—he said, who is that man and I told him and then Robert realized who he was and knew he was from out West and pretty strong personality in Las Vegas and they told me, said, if your Dad or anything comes from that man out West, if anything happens to me from those people I know you had to say something to them and that if you say anything to those people then one of us here is maybe going to do something to you.

Q. So, they said if you said anything they were going to do something to you, is that correct? A. Yes, said the best thing to do would be just to be quiet or something was liable to happen to us.

Q. Alright, what did you do then? A. They left and I caught a plane the next morning and went back to Texas.

Q. I believe you have stated during your testimony that you knew William Douglas. When did you meet William Douglas for the first time? A. Oh, three or four days before this game took place.

Q. And, how did you happen to meet William Douglas? A. Walter Gaddy contacted me and told me that Bill Douglas was coming back to town, that he had already played Robert Wood in a previous poker game and he also stated that Douglas would want to meet me or see me and so, that's how Douglas contacted me.

Q. So, you were introduced to Douglas by Walter Gaddy two or three days before this game? A. That's correct.

Q. Did you know Robert Wood? A. Yes, I did.

Q. How long and under or how did you happen to know Robert Wood? A. I had met him—oh, approximately a year before, I think.

Q. And, where had you met him? A. Somehow I think Sonny Belt introduced us.

Q. And, had you known him well or fairly well or did you ——(Interrupted) A. I would just see him off and on, maybe just a few times during that year, run into him.

Q. And, how did you happen to know Walter Gaddy? A. I met him in Texas, oh, seven or eight years ago.

Q. So, you've known Walter Gaddy for a long time, is that correct? A. Yes, I hadn't seen him in a long time, but I knew him a long time.

Q. Just so, I don't think it would confuse any of the jurors, but just to be sure, I'd like to hand you what's already been marked State's Exhibit "8" and ask you if that is a photograph of yourself, I believe, without your mustache and I think your hair is styled a little differently in that. A. That's correct.

Q. And, is that photograph more accurately how you appeared in the month of July, 1970? A. That's correct.

Q. You stated that three male Negroes came into the apartment, is that correct? A. That is correct.

Q. Were these people—did these people have weapons? A. Yes, they did.

Q. Did you notice what type of weapons? A. Oh, pistols and a sawed-off shotgun.

Q. Pistols and a sawed-off shotgun. Were they all armed? A. Yes, I believe so.

Q. Did you see whether or not Joe Wood returned to the apartment when the three male Negroes entered the apartment? A. No, I didn't, no.

Q. Do you know one way or the other? A. I didn't see him.

Q. If the Court will indulge me just one moment.

The Court: Sure:

Q. I realize that you can't answer with any exactness or assume that you can't with any exactness, but I think that it would be helpful to all of us if you would just give us your estimate of the amount of money that was involved in the poker game.

Mr. McKnight Objects: Your Honor, that calls for speculation. He's already said he don't know. He's tried to bring that out——(interrupted)

Q. If there is any objection to it, I'll withdraw the question, your Honor.

Mr. McKnight: He says he just don't know, your Honor.

The Court: The question is withdrawn.

Q. I have no further questions.

Mr. McKnight: Your Honor, as far as the defendant Joe E. Wood is concerned, I have an objection to make as to this

testimony about the hearsay part of it as far as Joe Wood is concerned. I think we ought to take it up out of the presence of the jury.

The Court: Well, you mean what this man testified happened there?

Mr. McKnight: No, sir, not necessarily what happened. About some statements made by various people in there including Bill Douglas and everybody else.

The Court: Well, Mr. McKnight, are you overlooking the fact that this is the—where the event actually happened, whatever happened there.

Mr. McKnight: Yes, sir, but there is some conversations had and some statements that he even went so far as to say that Bill Douglas said and so forth and of course, he was not present and it would be hearsay.

The Court: Alright, members of the jury, retire to your room. Do not discuss it and remain together back there.

(Jury out.)

* * * * * * * *

(Jury In)

The Court: Alright, bring the witness back, please.

Cross-Examination by Mr. Stanton

Q. Mr. Thomas, how old are you, Sir? A. Twenty-seven.

Q. Twenty-seven. What do you do for a living? A. Not much of anything.

Q. Well, how do you pay your bills? A. I live with my Dad and his wife and I take him to the golf course and he'll sometimes play golf for money or something and give me part of his play.

Q. And, you gamble a little bit yourself, don't you? A. Now and then.

Q. You recently got married, I believe. A. Pardon?

Q. You recently got married. A. Yes, I did.

Q. Mr. Thomas, I'll ask you if you had ever played with—had ever been present when Robert Wood and Bill Douglas played before? A. No.

Q. Did you know whether or not they had played before? A. Yes, I did.

Q. What happened on that prior game if you know?

Mr. Strother Objects: Object, the answer calls for hearsay, your Honor.

Q. If he knows I think he could answer.

The Court: If he knows and can state it without hearsay we'll let him answer it.

Q. What happened? A. Bill Douglas won six, seven, eight thousand off of Robert Wood.

Q. And, you of course weren't there when that happened, were you? A. No, I wasn't.

Q. Did you ever play with Bill Douglas when Robert Wood was present? A. Yes, I did.

Q. Alright, what name was Bill Douglas going by at this time? A. Ray Blaylock, I believe.

Q. Ray Blaylock and where did this game take place, Mr. Thomas? A. Walter Gaddy's apartment.

Q. And, do you remember when it took place, about when it took place in relation to—July the 6th is the day that Mr. Douglas was killed. A. You are referring to the game that I played in?

Q. Yes, Sir. A. Oh, approximately three or four days before this July 6th game.

Q. Three or four days earlier than that. Did you know you were going to—did you know whether or not you were going to win or lose when you played with Douglas? A. Pretty well.

Q. What were you going to do? A. Well, I figured to lose seeing how I knew who Bill Douglas was.

Q. And, you figured you would lose if you played Bill Douglas? A. Yes, I did.

Q. Did you play as well as you knew how to play? A. Well, I played poker to the best of my ability, I guess.

Q. And, you still figured you would lose? A. That's correct.

Q. And, was anybody backing half your winnings or going to pay half your losses? A. That's correct.

Q. Who? A. Robert Wood.

Q. And, how much in fact did you lose? A. About $1,-000.00.

Q. Sir? A. About a $1,000.00.

Q. And, did Robert Wood pay half of that thousand or whatever amount it was? A. He paid $600.00 of it.

Q. He paid $600.00. So, you lost I guess about $1200.00, is that right? A. Well, I think I lost—Bill Douglas gave me $400.00 and Robert Wood give me $600.00, so I lost about $1,000.00.

Q. And, did you have an agreement with Douglas where you would get part of the money back that Robert Wood lost through you to Douglas? A. Well, we had an understanding that—the idea was for Douglas to beat me and for me to see if he was cheating or not as far as Robert was concerned.

Q. That's as far as Robert was concerned. Now, what was the agreement the way you and Douglas—as far as Douglas was concerned? A. I knew Douglas was going to win the money.

Q. Alright and were you to get any part of Douglas' winnings? A. We didn't have a definite understanding there, but I would imagine I would have gotten part of it.

Q. You probably were going to get a three roll or something, weren't you? A. Something like that.

Q. What's a three roll? A. That's when two people gamble and you're on one person's side and you know that they figured to win. It's consideration money or something such as that.

Q. And, you figured Douglas would give you consideration money or something of that sort, is that correct? A. Yes, I did.

Q. Mr. Thomas, you knew Douglas was going to cheat, did you not? A. Yes, I did.

Q. And, do you know how a dob, D-O-B, I believe, a dob? A. Yes, I do.

Q. Did you know what method Douglas was going to use to cheat? A. Yes, I did.

Q. What method? A. Dob.

Q. May I see the State's dob.

Mr. Patterson: Please the Court, we don't have the dob here. We've showed it to them all, but we have certain procedures we go through and they've been objecting tremendously about different items and I have no objection to bringing it all down here and putting it in evidence through this man right here.

The Court: Well, we don't want it all now. They just want the dob.

Mr. Patterson: Well, the dob is attached to a shirt that was on the body of a man who is now deceased. We've removed it from the deceased. He's buried now.

Q. Bring the shirt and the dob and the snap on and all that.

Mr. McKnight: He has another one that he didn't have on.

Mr. Patterson: Please the Court, I think Mr. McKnight—— (interrupted)

The Court: Well, you're calling now for a part of the State's exhibits here.

Q. If your Honor please, I believe it's evidence that is extremely favorable to the defendant Robert Hugh Wood.

Mr. Patterson: It will go into evidence, please the Court, before this thing is over.

Q. I regret that I don't have it to introduce, but I think it's extremely pertinent and I'd like to ask Mr. Thomas about it.

Mr. Strother: I can and have prior to this occasion assured Mr. Stanton on any number of occasions and I resent any implication—that this would be introduced into evidence as part of our case and I told Mr. Stanton this and Mr. Stanton knows this.

Q. Of course I know this.

Mr. Strother: And, here he is trying to stand up here infer to this jury that we're not, but he knows as well as I do—— (interrupted)

The Court: It's the State's evidence, Mr. Stanton and the State intends to introduce. You gentlemen have seen it and this witness is familiar with it. Let's let him describe it.

Q. Alright, tell us about it, Mr. Thomas. Tell us what a dob is and how it works and where you sew it in and that sort of thing. A. Dob is a type of colored wax. In other words, you may put some types of dye in it to make it so it's like a candle only you will put this in a little small container and place it somewhere on your body so that when you rub your finger across

it it will put a slight amount of this coloring on your finger and then as you play cards if there is a white area in a playing card for instance, a dark and a light area, you put this dob very lightly on the white area and then it will stay on there and it shades it just to where someone who has had a trained eye for that can tell that that white has been shaded.

Q. Now, how would that dob be attached to the clothing or if you know?

Mr. Strother Objects: Your Honor, I object to that on the basis it calls for speculation on the part of this witness and a generalization. If he doesn't know how it's used in this particular case. It's irrelevant and immaterial.

The Court: If he knows we'll let him answer it, General, if he knows. Maybe he's used it, I don't know what he knows about it.

A. Bill Douglas was with me three or four days before this happened and he showed me the type of dob he uses and he can attach it anywhere under his cuff or his collar or under his coat or in between his shirt where it buttons down here. You can put it any place.

Q. And, how would he attach it? A. Well, you can get the kind with a snap that hooks on or you can get the kind that's got a little safety pin on the back of it, that's been soddered on there and so you just safety pin it on some place.

The Court: You've just seen it. The Court didn't mean to infer that you may have used it. You know about it though, don't you?

A. I know about it, yes.

The Court: He can testify.

Q. Mr. Thomas, could you look at a deck of cards that had this dob on it and determine whether or not they had been

marked in that manner that you described? A. Well, it depends on how heavy it's put on there. Like a professional, Bill Douglas, would put it on light enough to where he could use it in Las Vegas for instance, but an ameteur could put it on there where——

Q. Where I could see it even. A. Where anybody could see it.

Q. But you don't know whether you could tell if Douglas had put it on there or whether you couldn't? A. Whether I could tell whether he put it on there or not?

Q. Yes. A. It depends on the type of cards and whether I was used to looking at it or not.

Q. I see. Did Douglas ever give you any money from this $600.00 that he won from Robert Wood on the night you played Douglas? A. No, he hadn't.

Q. But you expected to get it sometime later on? A. The whole idea of me playing was the fact that I was supposed to see whether Bill Douglas was cheating for Robert Wood. Robert asked me to do that for him and obviously if I had said he wasn't cheating Robert was going to play him again himself.

Q. And, you told Robert he wasn't cheating? A. That's right.

Q. And, you lied to Robert? A. That's correct.

Q. Now, then this game was set up on the 6th day of July, 1970 and you were there at Walter Gaddy's apartment? A. That's correct.

Q. And, how long have you known Walter Gaddy? A. Seven or eight years, maybe more than that, I don't really know.

Q. I'll ask you was Douglas a close friend of your father's? A. Yes, he was.

Q. What's your father's name? A. Alvin Clarence Thomas.

Q. Woes he have a nickname? A. Yes, he does.

Q. What's that? A. Titanic.

Q. Titanic Thomas and the name is Thomas, it's not Thompson. Sometimes you went by the name of Thompson. A. Well, the nickname that goes with Titanic is Thompson, but——

Q. But your name really is Thomas. A. That's right.

Q. I see. Now, let's go on up to the night of July the 6th. I want to go through that very carefully. You said that these men—what time did they get over there? What time did they start playing? A. Early part of the evening.

Q. About what? A. 7 or 8:00.

Q. Was it dark when they started? A. I think it was just getting there or was dark. I think it was dark.

Q. Of course, it's Daylight Savings Time at that time. A. I don't remember.

Q. You know if it was dark it would be getting kind of late is what I was getting at, but they played a little bit before anything happened, did they not? A. When they got there they went to buy some playing cards.

Q. Alright, you bought Kim cards, I believe, plastic playing cards, did you not? A. Yes, sir.

Q. You were present when that took place and Joe Wood and Robert Wood and Ray Blaylock. A. That's right.

Q. Or know as Ray Blaylock and then you went back to the house, Walter Gaddy's apartment and they began to play cards, is that right? A. That's correct.

Q. Did they use the same deck? A. The idea was just to use the plastic cards.

Q. Well, there would be four decks of plastic cards, wouldn't

it or were these single decks that they bought or do you remember? A. I think it was at least two decks.

Q. At least two decks. A. I think they just used one, if I recall.

Q. And, never opened the second deck? A. I don't think so.

Q. And, who was winning and who was losing as best you can remember? A. Bill Douglas won.

Q. Was winning. Did you observe him using the dob? A. Yes, I did.

Q. Do you know where he had it on him? A. Well, I imagine his shirt collar.

Q. But you knew he was using it? A. I saw it on his finger when he was playing.

Q. I see and Robert Wood was losing. Do you know how much money Robert lost? A. Oh, he lost a couple thousand dollars and then he borrowed some from his brother.

Q. Alright, now, something occurred to make Bill Douglas go back into the bedroom and get a shotgun, is that right? A. That's correct.

Q. And, what was that? A. I looked outside and thought I might have seen somebody. Douglas said don't move to everybody and went back and got the shotgun and came back and held the shotgun on us.

Q. Held the gun on everybody there? A. Well, he wasn't supposed to know me, so he couldn't act like he was, you know——

Q. That's right. Mr. Sheriff, would you hand him that shotgun and let him see if he can—if that's the shotgun that Douglas had? A. That's an automatic shotgun. That's the same type.

Q. Was that received into evidence, if your Honor please, if isn't I'd like to——(interrupted)

Mr. Sheriff: State's Exhibit "2".

Q. Alright, so that's been admitted into evidence. That's the shotgun that he had, is that right? A. The same type of gun.

Q. Was that gun loaded as far as you know? A. I'm sure it was. I didn't see it loaded, but I wouldn't imagine he would hold an empty gun.

Q. As far as you were concerned it was loaded? A. Yes, sir.

Q. What kind of pistol did he have in his hand? A. It looked like a .38 caliber or .357.

Q. Was it short-nosed, short barrel, snub-nosed? A. It looked like a detective model, snub-nosed.

Q. Do you know whether or not it was loaded? A. Yeh, it was loaded.

Q. You could see the rounds in the cylinder on it, could you not? A. Well, I can't say that I looked close enough to see the rounds, but I just assume that it was loaded.

Q. And, what did he say when he had that pistol on you and on Robert Wood? A. He came back with the shotgun and pointed the shotgun at Robert and said are you holding a pistol or do you have a gun or anything and Robert just had on a shirt and he kind of pulled his shirt up and said, no.

Mr. McKnight Objects: Here again, your Honor, so there won't be any question about it, I object to these statements again on behalf of Joe Wood who was not present.

The Court: Let him repeat that. What did you say, sir?

A. Just then?

The Court: Yes, sir.

A. I said that he came back with a shotgun and after I said I saw somebody and held the shotgun on Robert and I and asked Robert, do you have a gun and Robert pulled up his shirt and said no.

Q. Could you see if Robert had a gun? A. No, he didn't have a gun as far as I could see. If he had of had a gun I would imagine—well, I don't know. If it looked like somebody was going to break in and you had a gun you would pull it out.

The Court: Mr. McKnight, are you making an objection to that statement?

Mr. McKnight: Well, I just object to him making any statements as far as Joe Wood is concerned because he's not present there to hear what the deceased had to say.

Q. Alright, then what happened?

The Court: Wait just a minute.

Q. Excuse me, Judge, I'm sorry.

The Court: Gentlemen, the defendant Joe Wood, we find from the evidence here that the defendant Joe Wood was not present in the room here when the deceased used the shotgun and the pistol as indicated by the witness here not to consider that for any purpose against the defendant Joe Wood because he was out of the room. Alright.

Q. Now, Joe Wood was not in the room at that period of time, was he? A. No, he wasn't.

Q. Where had he gone, Mr. Thomas? A. To get some beer he said.

Q. To get some beer and did he ask you to go with him? A. Yes, he did.

Q. Now, the only people in the room at that time were who? Who was in the room? A. William Douglas, myself and Robert Wood.

Q. Alright and then what happened? Did Robert Wood indicate that he felt like he was being cheated and he wanted to quit? Do you remember that happening?

Mr. Patterson Objects: I'm going to object unless he's saying specifically and not indication. That calls for a conclusion.

The Court: Sustain the objection.

Q. Alright, did Robert Wood want to quit? A. Robert Wood didn't act like he wanted to play again.

Q. Well, what did he say that made you come to that conclusion? A. Well, he was just standing there and this is after the brother came back in.

Q. What happened? A. Well, the brother is back in and Douglas said we're playing table stakes poker, let's get back to the game and Robert kind of hesitated a minute and Douglas said come on. Bill Douglas acted like all he wanted to do was just finish the poker game.

Q. Did Robert Wood tell Bill Douglas he was being cheated? A. He kind of acted like he felt like something was being done to him.

Q. And, did he say he wanted to quit? A. Oh, I wouldn't say exactly said he wanted to quit, but he felt like something was wrong.

Q. What did he say, Mr. Thomas, the best you remember? A. Well, he said—they were playing with the cards on the table and Bill Douglas was winning just about every hand and Robert could feel something was happening to him.

Q. And, did he say——(Interrupted)

Mr. Strother Objects: Your Honor, I'm going to object at this point. Mr. Stanton keeps repeating this question and keeps calling for this witness to speculate, speculate, speculate. I'm going to object to speculation on the part of this witness as to what Robert Wood felt and what Robert Wood thought or anything along those lines.

The Court: That's a proper objection, Mr. Stanton.

Mr. Strother: He has said several times that Robert Wood did not say he wanted to quit the game.

Q. Now, Mr. Tommy Thomas, I'll ask you if you remember having a conversation with me on May 29, 1971 at the Dobb's House Coffee Shop at Love Field in Dallas, Texas? A. I recall that.

Q. And, I'll ask you whether or not you told me at that time the following: "Robert Wood was reluctant to play any more poker and looked rather scared. Bill looked at both of them saying——" (Interrupted)

Mr. Strother Objects: Now, your Honor, I'll object because this "Bill looked, he seemed to be" these are all conclusions on the part of this witness and that's the very type material that I am objecting to.

Q. Your Honor please, I am getting ready to quote exactly what he told me in Dallas, which is on tape, which the jury can listen to if they like as to the exact statement he told me occurred that Robert Wood told——(Interrupted)

The Court: Does it embrace these conclusions?

Q. No, sir, it's a prior inconsistent statement.

The Court: Well, I know that. Mr. Strother has the idea here that this witness is simply drawing conclusions or impressions from certain sets of facts and things of that nature. Does that relate to that?

Q. No, sir, this relates to the statement Robert Wood says that he doesn't want to play any more poker——

The Court: Alright, you may ask him that question.

Mr. Strother objects: Your Honor, I object to what Robert Wood said in there as hearsay.

The Court: Well, he's attempting to attack this witness' credibility. Now, gentlemen of the jury, this matter that Mr. Stanton is referring to may be considered only for the purpose of you determining the credibility and how much weight you'll give this witness' testimony. He's testifying before you in person under oath. That's the testimony you are to consider, but you may consider any prior inconsistent statements as going to his credibility here today and the questions he's propounding are not offered for the truth and veracity of it, but they go to his credibility only.

Q. Now, Mr. Thomas, I'll ask you if you told me the following: "Robert Wood said there is nothing wrong, but I don't want to play any more poker. I feel I am being cheated. Bill said, well, how are you being cheated? Robert Wood said, I don't know, but it seems like there is something wrong to me and I want my money back. Bill said, you're not being cheated. We're playing table stakes poker and we have to play until every dollar is won or lost." A. Now, in regards to that as far as Robert Wood saying he wanted his money back, when you play poker you don't ask for your money back, but as far as him feeling something was being done to him, he more or less inferred——(Interrupted)

Mr. Strother Objects: Your Honor, I object to what he felt.

The Court: Sustained.

Q. I'll ask you if you remember making that statement? A. Yes, sir, I do.

Q. You told me that in Dallas? A. Robert may have said he felt he was being cheated. I don't know.

Q. And, then he told him to sit down, he was going to play until all the money was won or lost on the table? A. He said we're playing table stakes poker and we want to finish this game.

Q. Well, what does table stakes poker mean? A. Well, you both take out so much money and it wouldn't be right for one player to get up and just—like you've got one player losing

and the other player has a few hundred dollars, you can't just say well, I'm going to quit now. You've got to play until the money is won or lost.

Q. Alright, now, was Douglas at this point armed? A. Yes, he was.

Q. What kind of pistol did he have on him and where did he have it? A. He had the shotgun and the pistol at that time.

Q. At the time he was making these statements to Robert? A. Yes.

Q. Alright and what did Robert Wood do? A. Robert Wood just stood there for a few minutes and he asked Joe Wood if he had a pistol on him.

Q. And, then what happened? A. And, then Joe said no and then Robert sat back down and Douglas put the shotgun in the bedroom.

Q. I thought you said that Joe was outside at this time? Had he come back in? A. He was back in.

Q. Alright and what did Douglas do to Joe Wood as he came back in? Did he point the pistol and the shotgun at him? A. He held the shotgun on him and made him crawl in the window, just let him crawl in the window, didn't make him crawl in.

Q. But he had the shotgun and the pistol both on him? A. Well, on all of us.

Q. Alright.

The Court: Who was present when the deceased drew the shotgun and the pistol? Who all was present in the room?

A. Robert Wood and myself.

The Court: I understood you just to say the defendant Joe Wood was back in the room at that time.

A. No, when he drew the pistol and grabbed the shotgun just Robert Wood and myself were in there, but then he took the shotgun and pointed it at the window or out the window and Joe Wood was outside and he said, you crawl in the window and held the shotgun on Joe as he crawled in from outside the window. In other words, he thought that maybe there might be some people outside or something and so he held the shotgun on Joe and said come in the window that way.

Q. And, the door remained——(Interrupted) A. And, that way just one person could come in at a time.

Q. Alright and then what did Joe Wood do? A. He came inside.

Q. Alright, where was the pistol that the deceased had at this time? A. In his hand.

Q. Alright and was Joe Wood armed? A. No, he asked him if he was armed and he said no.

Q. Alright and then what happened? A. Well, they went back and he said let's finish the poker game.

Q. And, how long a period of time did they play poker? A. A few minutes.

Q. A few minutes? A. I don't know, not much longer.

Q. And, then what happened? A. Joe Wood got up and went to the restroom.

Q. Alright, I'm not going to ask you what happened back there, but when he returned, what happened? A. He came back and pulled a pistol.

Q. Joe did? A. Joe did.

Q. Alright and what did he do with the pistol? A. He had it on Douglas.

Q. And, was Douglas' pistol in his belt at that time? A. I just can't swear where his pistol was. I just don't know if it

was in his belt or on the table or in his pocket, I don't know where it was.

Q. Alright and Joe Wood left? A. Well, he told me to lay down on the floor.

Q. Who did, Joe? A. Joe did.

Q. Alright and you laid down on the floor? A. That's correct.

Q. Alright and you could see Robert, could you not? A. Could I see Robert, yeh, as I was laying down on the floor.

Q. Alright and did Robert have a pistol then? A. No, he didn't.

Q. Alright, did you see anybody give Robert a pistol? A. Well, I think Joe gave him the pistol as he jumped over me.

Q. What kind of pistol was it? A. Small caliber gun.

Q. Was it a Daringer type pistol? A. Could have been. I can't swear to that.

Q. You were getting pretty excited about this time, I imagine, weren't you, Mr. Thomas? A. I was pretty excited when he told me to hit the floor.

Q. Alright and did Robert Wood put the pistol on you? A. No.

Q. Sir? A. No, he didn't.

Q. He did not? A. No.

Q. What did he do with the pistol? A. He just held it in his hand.

Q. Was he pointing it at Douglas? A. No, he wasn't.

Q. Then what did Douglas do? A. Douglas just stood there.

Q. And, then what happened? A. I looked up at Robert and told him, I said, Robert, you're making a mistake here and stood up off of the floor.

Q. Alright and Robert didn't make any move to shoot you, did he? A. If he did I wouldn't have gotten up off of the floor if he did.

Q. Did he point the pistol at you at this time? A. No, he didn't.

Q. Alright and then what happened? A. I reached over and shut the door.

Q. And, then what did you do with the two by four in the door? A. Nothing.

Q. Did you put the two by four back under the door or do you remember that? A. No, I just turned the little lock in the door.

Q. You locked the door. Alright, then what happened? A. Well, as I turned to lock the door Douglas made some kind of move. He was on one side of the table and Robert on the other and I just—a shot was fired, the door was kicked opened and——

Q. Wait a minute. Let's don't go quite so fast. Douglas made some kind of move. What kind of a move did he make? Did he make a move to go to his pistol? A. I don't know.

Q. Did he make a lunge at Robert Wood's pistol? Did he—what was he doing as best you remember? A. He was standing on the other side of the table. Robert was on one side and he was on the other. I just reached over to shut the door and then I saw Douglas make some kind of move.

Q. What kind of move? A. Oh, I just couldn't tell you.

Q. He was going for that pistol, wasn't he? A. I don't know.

Q. Was Douglas going for his pistol at that point, Mr. Thomas? A. Well, I didn't see him with a pistol at that point. I don't know if he was or not. He might have been going for a pistol, I couldn't tell you.

Q. Well, he wasn't reaching out there to grab a deck of cards, was he, to continue playing poker? A. Well, I assume at that point he had had all the poker he wanted, I don't know.

Q. Alright and then Robert Wood shot him? A. I don't know about that either.

Q. Well, who shot him? Was anybody else in the room? A. No, there wasn't.

Q. Well, you didn't shoot him, did you? A. Sure didn't.

Q. Alright, but a shot was fired. A. I didn't see Bill Douglas fall.

Q. Alright, you didn't see a pistol fly out of his hand and hit the plaster board behind him either, did you? A. At this time I'm facing the door and the door was kicked opened and I was behind the door at this time.

Q. But before that door was kicked opened a shot had already been fired at Bill Douglas, had it not? A. A shot had been fired.

Q. Alright, then the door was kicked opened and some people come into the room, right? A. That's right.

Q. Alright, was another shot fired? A. Yeh, just as they kicked the door open another shot or maybe two more shots were fired.

Q. And, alright and do you know who fired them? A. One of the Negroes that came back in.

Q. Fired into the room where you were? A. I assume it was one of them. Three of them came back in there and all of thems had guns. I would imagine that's who it was.

Q. Alright, Robert Wood didn't shoot again, did he? A. No.

Q. And, then what happened? A. One of the men that came back in swung a pistol at me.

Q. And, Robert Wood told them to quit or not to hurt you or something to that effect, did he not? A. He said, don't hurt that boy.

Q. And, then you gave one of the black men your knife and had some money attached to it, is that right? A. Well, it was in my pocket, yeh. He said, what's that bulging in your pocket and I pulled it out.

Q. Alright and then you went across the hall to this gentleman's back here and—Don James and asked him to call the police and told him somebody had been hurt, isn't that right? A. Call an ambulance and the police, that's correct.

Q. Call an ambulance. Did you know that Bill Douglas was dead at this time? A. He looked dead to me.

Q. And, where was his body lying? A. Well, like his head was right at the front of the kitchen right there.

Q. His feet inside the—— A. Yeh.

Q. And, then what did you do? A. Went back to Barbara King Howell's apartment.

Q. And, you climbed some fences, I think and kind of tore some clothes and arrived over there in somewhat of a mess, did you not? A. I was in a hurry to get there.

Q. And, you went across the back way to get there? A. Yes, Sir, I didn't want to be seen by anybody.

Q. And, had to climb a cyclone fence with some barb-wire across the top of it, didn't you, Mr. Thomas? A. That's correct.

Q. And, you did it with some degree of dexterity, I understand and in so doing cut your hand. Alright and then you got back over to Barbara King Howell's apartment and you say Sonny Bell was there. A. He wasn't there when I got there.

Q. Wasn't there when you got there. Just nobody was there but Barbara? A. That's right. No, there were two girls there.

Q. And, you asked the two girls to leave? A. Yeh.

Q. Did you know the two girls? A. I had seen one of them before. I had seen them before—I don't know if it's the same two I saw two or three days before down there at Walter Gaddy's apartment or not. One of them was for sure.

Q. And, you asked them to leave and then you and—and then a few minutes later Barbara got a telephone call from somebody. The telephone rang. Did you talk to anybody on that telephone? A. By gosh, I don't remember if I did or not.

Q. Alright and then Robert Wood and Joe Wood came over to that apartment sometime later, is that right? A. That's right.

Q. And, Joe Wood or somebody, do you remember which one made some statements to you about the best thing to do was to go along with the fact that three black men robbed this game? Was that statement made to you? A. Yes, it was.

Q. Do you remember who made it? A. Joe Wood.

Q. Joe made it. Alright and what did—did you agree to go along with that? A. Sure.

Q. Now, at this point you told Robert Wood with whom he had been playing, did you not? A. That's right. He asked me who he had been playing.

Q. And, you told him Bill Douglas? A. That's right.

Q. As far as you knew Robert Wood hadn't ever been told that before in your presence anyway? A. No, he didn't know it.

Q. He didn't know it and then Robert Wood says what? A. What did Robert Wood say then?

Q. Yes. A. He said something to the effect that wasn't Bill Douglas a good friend of your Dad's and all and I think he knew Bill Douglas from before.

Q. And, you told him Bill Douglas was a good friend of your

father's? A. Yeh and he said Bill Douglas out in Vegas has got a lot of money and all.

Q. He indicated that if Bill Douglas and ya'll sent somebody to get him he was going to protect himself, did he not? A. Well, he said that if anything happened to him, tell those people out West something, that something is just liable to happen to us.

Q. Alright and you were later questioned by the FBI down in Dallas, Texas, were you not, Mr. Thomas? A. That's right.

Q. And, you told the FBI in Dallas that you had—that this poker game had been robbed by three black guys, is that not so? A. That's right.

Q. And, that wasn't true? A. No, it wasn't.

Q. Then you later came up here and testified I assume before the Grand Jury, did you not? A. That's right.

Q. I think that's all.

Mr. McKnight: I have no questions on behalf of Joe Wood.

Cross-Examination by Mr. Smith

Q. Please the Court, on behalf of James Randolph, I'd like to ask Mr. Thomas one question. Could you identify any of the colored boys that were there, you stated were there that night? A. No, I couldn't.

Q. That's all the questions.

Mr. Cassell: No questions on behalf of Isiah Hamilton.

Mr. Sabella: No questions on behalf of Wilbur Lee Pickens, your Honor.

Redirect Examination by Mr. Strother

Q. Just one more question, if I might just to clear up one matter. You testified, I believe, at one point that Joe Wood

left to get some beer and that at a later time you looked out the window, is that correct? A. Yes.

Q. Now, what caused you to look out that window? A. Well, he knocked on the door and anytime somebody knocks on the door and there is a lot of money in the room involved in a poker game it's best to look outside.

Q. Well, you say he knocked on the door. Who knocked on the door? A. Well, I don't know.

Q. Well, when you looked out the door who did you see standing out there as if they had knocked on the door? A. I just thought I saw more than one person there. I couldn't identify who it was at the door in the dark.

Q. Alright, when the time came to open the door or—did someone show themselves right at this time, one person? A. No, Bill Douglas went and got the shotgun and came back and held it on Robert and I and then a few minutes later he looked out the window and yelled outside and said, who's there or something and Joe said it's just me. It's me outside or Joe Wood and Douglas said is somebody with you or something like that and he said no.

Q. So, the indication was that it was Joe Wood——(interrupted)

Mr. Sabella Objects: If your Honor please, I don't think that the State's attorney ought to be asking this witness what the indication was. I think that he is required to ask what was said and what was said by one and what was said by the other.

The Court: Yes, sir.

Q. What explanation was given by Joe Wood at that time? A. He said some people had walked upstairs or walked by or something and that's who I had probably seen outside.

Q. Thank you. No further questions.

The Court: Gentlemen, if you find any statements or accusations made accusing the defendants Randolph, Hamilton and Pickens made in their absence and not heard and understood by them, you cannot consider it against them for any purpose whatsoever. Alright.

Mr. Patterson: If this witness may be excused, please the Court.

The Court: Is there a recess ordered by anyone, a short recess, or not?

Mr. Stanton: Your Honor please, we had also subpoenaed this witness and we ask that he not be excused to go back to wherever it is he goes back to.

The Court: Mr. Thomas, you're ordered by the Court to remain available. You also were subpoenaed by one or more of the defense attorneys. Do you understand?

A. For how long, sir?

The Court: That is undetermined. We really don't know. Mr. Stanton, you can't give us any idea about that, can you?

Mr. Stanton: I think it would be best if we didn't.

The Court: Alright, sir, I'm sure they won't keep you long, Mr. Thomas.

Mr. Strother: We have a witness that is—well, this perhaps would be better gone into outside the presence of the jury. I'm not asking that the jury be excused. We're ready to call our next witness if there is no need for a recess.

Mr. Stanton: I thought we were going to have a short recess.

The Court: Would you gentlemen desire a short recess? No desire, no request for it?

Mr. Stanton: I would.

The Court: You request it, alright.

Mr. Patterson: Why don't we just wait for Mr. Stanton? These five minute recesses turn into thirty minutes.

The Court: Mr. Stanton, the Court will remain in session.

Mr. Stanton: I wanted to talk to these lawyers just a second, if your Honor please.

The Court: Members, retire to your room.

(Recess)

(Jury Out)

Mr. Stanton: I don't think it's going to be necessary as far as the defense is concerned, Robert Wood is concerned, for Mr. Thomas to remain here. His home is not in Memphis and I think we can excuse him as far as Robert Wood is concerned.

Mr. Strother: I believe that was the only objection and it's costing the State frankly $25.00 a day witness fee to keep these people here. It would save the State $50.00 a day if we could let them go on back.

The Court: Alright, Mr. Thomas, Tommy Thomas, the lawyers have excused you now. You've testified and they've concluded here that they don't need you any further, for any more questions. So, you're free to return to your home, State, if it's your desire. Thanks a lot to you. Bring in the jury.

(Jury in)

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

January 1974

Appeal From the Criminal Court of Shelby County
Honorable Perry H. Sellers, Judge

Robert Hugh Wood
Joe E. Wood
Isiah Hamilton
James Albert Randolph and
Wilber Lee Pickens
Plaintiffs in Error

vs.

State of Tennessee
Defendant in Error

No. 41
Shelby County

(Filed June 5, 1974)

For Plaintiffs in Error:

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H. H. McKnight
Memphis, Tennessee
Robert L. Smith
Memphis, Tennessee
Charles J. Cassell
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JUDGMENT REVERSED AND REMANDED
OPINION BY JUDGE CHARLES GALBREATH

OPINION

The five defendants in this case were jointly indicted, tried and convicted of murder in the perpetration of robbery and each sentenced to life imprisonment in the State penitentiary. Each was represented by retained counsel in the trial court and each has filed assignments of error and a brief in support thereof in this Court.

Of the numerous errors assigned by these defendants, those attacking the sufficiency of the evidence and the admissibility of confessions appear to have merit. To bring these contentions into focus, the evidence is summarized as follows:

Approximately three weeks prior to July 6, 1970, a poker game was arranged by Walter Lee (Woppy) Gaddy between the defendant, Robert Hugh Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional Las Vegas gambler, had made arrangements with Gaddy to use the latter's apartment and for Gaddy to make the initial contact with the defendant Wood. Under the arrangement Gaddy was to receive a cut of the winnings for the use of the apartment and for making the set-up. Wood was told that several people were to play in the game, but as planned only Wood and Douglas showed up for the game.

During the first game, Wood lost about "twenty something hundred dollars." A week later, a second game was played at Gaddy's apartment and Wood lost another $1,500 to $2,000. A third game was played a few days before July 6th, but this time between the deceased and Tommy Thomas, an acquaintance of Wood who had a reputation of being a "pretty good" poker player. Thomas played with $1,000 of which $600

had been put up by Wood. The purpose of this game was to determine if and how the deceased was cheating. Thomas, however, was the son of Titanic Thomas, a well known professional gambler and a close friend of the deceased. Tommy, as pre-arranged with the deceased, lost the game and reported to Wood that as far as he could tell the deceased was not cheating. Actually cheating was accomplished by transferring a small amount of colored wax onto white areas of the playing cards from a supply of the substance, called a "dob" by the witness Thomas, concealed under the shirt collar of Douglas in a small metallic container.

A fourth game between Douglas and Wood was set up for July 6, 1970, at Gaddy's apartment. Wood, still suspecting that Douglas was cheating, took his brother Joe along with him. Tommy Thomas was also present at the game. Joe had arranged for the other co-defendants, Randolph, Hamilton and Pickens, to come by the apartment to help get his brother's money back by staging a "hold up."

During the course of this fourth game, Joe Wood left to get some beer. When Joe returned with the beer, Tommy Thomas and Douglas heard others outside the apartment, and fearing a robbery attempt Douglas brandished a .38 caliber pistol and an automatic shotgun. Joe convinced them that he was alone, but as a precautionary measure, Douglas made Joe enter the apartment through a small window. After this incident Robert Wood wanted to stop the game and leave, but Douglas insisted that the game continue. The game was resumed and after a few minutes Joe Wood went to the bathroom. On his return he was carrying a small caliber derringer pistol, and he ordered Thomas and Douglas to lie on the floor. Thomas complied with the demand but Douglas remained seated at the table. Joe handed the gun to his brother and left through the front door. According to his undisputed testimony Robert Wood stood there with the gun down by his side, and when Thomas got up

from the door and was in the process of locking the front door he saw Douglas make a move and shot him as the deceased was reaching for his gun. Immediately following the shooting, Joe and the other three co-defendants forced their way into the apartment. The money on the table was taken, as was a knife and about $50 from Tommy Thomas, and then all five of the defendants fled.

While we are well aware of the presumptions and burden of proof facing the defendants in their challenge on the sufficiency of the evidence, we are also aware of our duty to intercede and reverse the trial court where the evidence is clearly insufficient to support the conviction. Under the facts as presented in this particular case, we must follow the latter course of action.

There is nothing in this record to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confessions of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.

The defendants have also challenged the admission into evidence of the confessions of the co-defendants Randolph, Hamilton and Pickens and the statement of Robert Wood. Their contention is that since the confession implicates not only the confessing defendant but also other co-defendants, and since the confessing defendants did not take the stand, the co-defendants were denied their Sixth Amendment right to confrontation of witnesses against them. *Bruton v. United States*, 391 U S 123, 88 S Ct 1620. This claim appears to have merit as

regards the confessions of Randolph, Hamilton and Pickens but not regarding Robert Wood's statement. Robert Wood took the stand and was therefore subject to cross-examination by the other defendants.

Although an attempt was made to avoid prejudice to the other defendants by omitting their names from the confessions as read to the jury, a reading of the confessions clearly indicates that mere omission of names was not sufficient to avoid harm to the other defendants. As judge Dwyer said for this Court in *White v. State*, 497 S W 2d 751:

> "To assume, as urged here by the state, that the insertion of 'the other person' cured any possible prejudice to Johnson would be legal sophistry. Or as Justice Learned Hand states, it would be a 'mental gymnastic which is beyond not only their (the jurors') powers, but anybody elses.' See Nash v. United States, 54 F 2d 1006, 1007 (2nd Cir. 1932). We have stated before that a statement of the confessing co-defendant could be used only if completely stripped of any incriminating references to the non-confessor. See Taylor v. State, Tenn. Cr. App., 493 S W 2d 477. In this context the insertion of 'the other person' does not meet that test. See Serio v. United States, 131 US App D.C. 38, 401 F 2d 989, 990."

While reversal is not predicated solely on the incorrect admission of these confessions, such would have been the case had there not been any other error found by this Court.

All of the other assignments of error have been considered and found to be without merit. The case is reversed and remanded for a new trial consistant with this opinion.

/s/ CHARLES GALBREATH, Judge

Concur:

/s/ W. WAYNE OLIVER, Judge
JOHN A. MITCHELL, Judge

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
AT JACKSON

(Title omitted in printing)

DISSENTING AND CONCURRING OPINION

(Filed June 5, 1974)

I respectfully dissent in part and concur in part.

I agree that the admission in evidence of the confessions of the non-testifying co-defendants was a violation of the rule in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476, and prejudicial to the rights of those defendants who were deprived of the right to cross-examine the non-testifying co-defendants and therefore constituted reversible error. See opinion of Judge Robert K. Dwyer in *White v. State*, — Tenn. Crim. App. —, 497 S.W.2d 751.

Robert Wood contended that although the words "other party" and "another party" were substituted for the name "Robert Wood" in the statements of the co-defendants it was easy to see that Robert Wood was the name that had been eliminated from the statements.

Robert Wood may have been identifiable from his co-defendants' statements but, I am unable to find any merit in this contention because in the statements of Pickens and Hamilton they told about Robert Wood shooting Douglas. They heard the shot and on entering the room they saw Robert Wood with the pistol in his hand and Douglas lying on the floor. They heard Robert Wood say he shot Douglas. They also told about the plan to rob the poker game which was organized by Robert Wood's brother Joe Wood.

Robert Wood took the witness stand and testified substantially to a great many of the material facts contained in his co-defendants' statements.

Robert Wood told his brother Joe that the deceased was cheating and he intended to get his money back. That several people there had guns and he might need some help to get it back. And he said he would bring somebody with him that worked for him.

Robert Wood said "If I caught the man cheating I was going to demand my money back and I did not figure he would be willing to give it up that easily.

On cross-examination Robert Wood was asked "so you could say that they were coming there to rob this man, is that correct?" Robert Wood answered, "Well, if you call it that, I would call it if you had been cheated out of your money, you just got your money back it wouldn't be considered as robbing somebody." Robert Wood said he did not catch him cheating and he did not ask for his money back.

That his brother Joe was to see to it that they got there. That he sat down and started playing again.

That he saw his brother come back in with the three male blacks, the co-defendants Wilber Pickens, Isaiah Hamilton and James Randolph with weapons and that he knew one shot was fired.

Robert Wood said he went there to get even if he could. That his brother Joe Wood said "he could bring some help if I thought I would need it." That the man might not want to give the money back, but he intended to get his money back if he caught him cheating. That he let his brother know he wanted him to bring help if he wanted to, that he did not tell him whether to come armed, that he figured his brother Joe would

have a gun on him or in the car. That Joe said some of his help would be with him.

The district attorney asked "In talking about the understanding you had with your brother Joe Wood," "Now you've already said as I understood you that you asked him or that you agreed that he was going to bring some help because you were going to ask for your money back if you caught him cheating, is that right?" The defendant Robert Wood answered "That's right." That he told Joe where the place was.

The defendant Robert Wood also testified he talked with his brother Joe Wood about getting his money back and that he wanted his brother to bring help if he wanted to do so. That he figured his brother Joe would either have a gun on him or in his car. That his brother Joe told him some of his help would be there. Robert Wood said he helped to plan the game in order to get back what he had lost. That he had lost heavily, perhaps $4,000.00. That his brother Joe came along armed and furnished him the pistol with which he shot Douglas. That he shot and killed Douglas and then took the money which was over $2,000.00 from the gambling table. That they planned what story they would tell if arrested, and he cautioned his confederates not to involve him and Joe in the matter and fled. That the next morning he went back to Mississippi.

I do not think the defendant Robert Wood can escape the responsibility for his acts by saying he did not know of the robbery, or if he did know of it, the re-taking of the money was in a fake robbery and was for the purpose of recovering money illegally taken from him by a cheating gambler.

It seems to me that having testified about the facts contained in the statements of his co-defendants his testimony cleared or cured whatever objection he might make to the introduction of his co-defendants' statements.

In *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288, the Supreme Court said:

> "There are many cases in this jurisdiction and others which deal with the broad principle that if a defendant testifies in substance as to evidence which has been otherwise erroneously admitted, then his testimony clears whatever error there might have been. See *Zachary v. State*, 144 Tenn. 623, 234 S.W. 758; *Moon v. State*, 146 Tenn. 319, 242 S.W. 39; *Switzer v. State*, 213 Tenn. 671, 378 S.W.2d 760; *Owens v. State*, 202 Tenn. 679, 308 S.W.2d 423; *Cathey v. State*, 191 Tenn. 617, 235 S.W.2d 601; and others. Thus, these cases clearly show that the rule is not limited to the situation where the defendant takes the stand and admits he committed the crime with which he was charged."

In *McClain v. State*, — Tenn. Crim. App. —, 455 S.W.2d 942, in an opinion by Judge Charles Galbreath, concurred in by Presiding Judge Mark A. Walker, and result concurred in by Judge W. Wayne Oliver, we cited and quoted *Hill v. United States*, 363 F.2d 176 (5 Cir.) where the Court said:

> "We reject this assigned error for a second and entirely different reason. When Hill testified in his own behalf, he substantially repeated the accountant's testimony which is complained about in this assignment. If there was any error in the admission of the accountant's testimony, it was cured by Hill's testimony to the same facts. See *Barshop v. United States*, 192 F.2d 699 (5th Cir. 1951), cert. den. 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 688 (1952). Thus we find no prejudicial error in the admission of the accountant's testimony, or the trial court's refusal to withdraw it from the jury's consideration. 363 F.2d 180, 181."

In *McGregor v. State*, — Tenn. Crim. App. —, 491 S.W.2d 619 cert. denied March 1973, in an opinion by Judge Robert K. Dwyer, concurred in by Walker, Presiding Judge, and O'Brien, Judge, we said:

"Further, when the defendant voluntarily took the witness stand at the trial and gave testimony explaining the presence of the weapon and the satchel that were introduced, he cured any illegal search question, because his own words established the existence of these two articles in his car. See *Lester v. State*, 216 Tenn. 615, 624, 393 S.W.2d 288. The assignment pertaining to the legality of the search is overruled."

Able counsel for the defendant Robert Wood in his excellent brief has made the contention that a new trial should be granted to Robert Wood because of the erroneous introduction of the statements of the non-testifying co-defendants in which they identified Robert Wood as the man who shot and killed William Douglas.

In considering this contention we are faced with the plain and positive fact that Robert Wood voluntarily took the witness stand and testified in his own behalf and admitted he fired the pistol shot which killed Douglas.

I think this contention is without merit.

I cannot agree with the majority opinion holding that the killing was not done in the perpetration of a robbery.

The robbery was planned for the purpose of assisting the defendant Robert Wood to recover the money he had lost in a gambling game with the deceased William Douglas.

I think the facts show that the robbery was commencing according to plan at the place and at the time of or a few seconds before Robert Wood shot and killed the deceased Douglas. Those who were to commit the robbery were at the door preparing to enter. It is true that the actual taking of the money was subsequent to the fatal shooting of Douglas.

The defendant Robert Wood testified he took the money from the table immediately after he shot Douglas.

I cannot agree with the holding of the majority opinion that the evidence is insufficient to support the conviction of Robert Wood. Robert Wood in his testimony says he shot and killed the deceased William Douglas at a time when Douglas was reaching for his gun.

The jury heard all the proof, saw and heard the witnesses testify, including the defendant Wood. The jury rejected the defendant Robert Wood's theory that he shot in his own necessary self defense.

The verdict of the jury approved by the trial court takes away the presumption of innocence which stood for the defendant in the trial court and he is here under the presumption of guilt. The burden is on the defendant to show that the evidence preponderates against the verdict. We may not reverse a conviction on the facts unless the evidence preponderates against the verdict and in favor of his innocence. *White v. State*, 210 Tenn. 78, 356 S.W.2d 411; *Holt v. State*, 210 Tenn. 188, 357 S.W.2d 57; *Gann v. State*, 214 Tenn. 711, 383 S.W.2d 32.

Moreover, it was the province of the jury to settle the issue of self defense. The jury heard the witnesses and observed them on the witness stand, passed on their credibility and decided in favor of the state's contention. I am unable to say that the evidence preponderates against the finding of the jury. *Arterburn v. State*, 216 Tenn. 240, 391 S.W.2d 648; *King v. State*, — Tenn. Crim. App. —, 432 S.W.2d 490.

I would hold that the evidence does not preponderate against the jury's verdict and in favor of the innocence of the defendant Robert Wood.

In *Grace v. State*, 493 S.W.2d 474 (1973), the Supreme Court of Tennessee in reversing the judgment of the Court of Criminal Appeals said:

"Neither this Court, nor the Court of Criminal Appeals is free to re-evaluate the evidence as it pleases. A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt upon appeal. The defendant has the burden upon appeal of showing that the evidence preponderates against the verdict (and) in favor of his innocence."

I would affirm the judgment against the defendant Robert Hugh Wood.

/s/ JOHN A. MITCHELL, Judge

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

(Title Omitted in Printing)

(Filed Dec. 15, 1975)

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OPINION

REVERSED PER CURIAM

This case presents two principal issues, viz: (1) whether the facts justify an application of the "felony-murder" rule, and (2) whether the admissibility of certain confessions of the co-defendants constitute a violation of the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

The five defendants were convicted of murder in the perpetration of robbery and were sentenced to life imprisonment. The Court of Criminal Appeals reversed and remanded for a new trial.

I

The record reveals the following crucial facts surrounding this homicide.

Approximately three weeks prior to the night of the incident at issue, July 6, 1970, a poker game was arranged by one Walter Lee (Woppy) Gaddy between respondent, Robert Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional gambler from Las Vegas had agreed to give Gaddy a cut of his winnings in exchange for the use of his apartment, and his effort at setting up Robert Wood. Wood arrived for this first game, anticipating the presence of several participants, yet only he and the deceased, as planned, showed up. The final result of this initial encounter was that Wood lost "twenty-some hundred dollars."

A similar pattern was followed for the second meeting one week later. This game also produced a similar result. Wood losing another fifteen hundred ($1,500) to two thousand ($2,000) dollars.

For the scheduled third meeting of July 3, 1970, Wood, his suspicions of being cheated[1] having increased with each game, decided to bring along an acquaintance, Tommy Thomas, who had the reputation of being a "pretty good poker player." However, the fathers of Thomas and Douglas had been close friends, and Thomas was also persuaded to fix the game by losing some one thousand ($1,000) dollars, six hundred ($600) dollars of which had been put up by Wood.

The fourth meeting between Douglas and Wood was set for July 6, 1970, again at Gaddy's apartment. Wood, convinced he was being cheated, asked his brother, Joe E. Wood, to come

[1] The record reflects that Douglas was playing with a marked deck. He was utilizing a wax substance on a deck of paper cards which was discernible to the trained eye.

along. The extent of Robert Wood's plan to retrieve the four thousand five hundred ($4,500) dollars he had lost is best demonstrated by his own testimony:

Q. Now, was your brother in any of these other games?

A. No, sir.

Q. How did he happen to come this time?

A. I had told him that I would probably need some money and I told him I suspected the man was cheating.

Q. Did you say anything to him about getting some help?

A. I told him that several people there and they had guns and so forth. I told him I suspected the man was cheating me. If I caught him cheating me, I was going to ask for my money back and I might need some help to get it back.

* * * * * * *

Q. And, you mentioned to him that you thought you were being cheated, is that correct?

A. Yes, sir.

Q. And, what else did you tell him?

A. I told him that I, we was getting plastic cards.

Q. That you were getting plastic cards?

A. To play with and I was going to see if I could catch him cheating in any way.

Q. And, did you tell him that there were men out there with guns if I understood you right?

A. I said the man had some guns there.

Q. Did you say anything to him about getting some help?

A. He said that he would bring somebody with him. I didn't know exactly who or how many.

Q. Said he would bring somebody with him?

A. That worked for him.

* * * * * * *

Q. Now, they were—you understood that he was to bring some people with him that worked for him, is that correct?

A. Yes, sir.

Q. What were they coming there for?

A. If I caught the man cheating, I was going to demand my money back and I did not figure he would be willing to give it up that easily.

Q. So you could say that they were coming there to rob this man, is that correct?

A. Well, if you would call it that, I would call it if you had been cheated out of your money, you just got your money back, it wouldn't be considered as robbing somebody.

Robert's brother, Joe, responding to this plea for assistance, contacted two of the other respondents, Isaiah Hamilton and Wilber Pickens, enlisting them in this scheme. Joe Wood, on July 4, 1970, took them to the Benbow Apartments (where the game was to be held), pointing out the particular apartment, and he promised them three hundred ($300) to four hundred ($400) dollars to rob the game explaining to them that his brother was being cheated. He also told them that he would be inside the apartment and would "kill him (Douglas) if I have to".

On the night of July 6, Joe Wood enlisted a third companion, James Randolph. Randolph, having been informed of the situation with the same brief yet decisive language used by Joe Wood with Hamilton and Pickens, joined these two and the trio headed for the Benbow Apartments.

At Gaddy's apartment the scene was as follows: Robert Wood and Douglas began playing poker around 7:30 p.m. Joe Wood and Tommy Thomas (who had come at the invitation of Douglas) sat in the same room as spectators. Between 8:30 p.m. and 9:00 p.m. Joe Wood announced he was going to get some more beer. He asked Thomas to accompany him, but Thomas elected to remain. While supposedly out getting beer, Joe Wood met with his three enlisted companions.

After a brief trip to the nearby Krystal Restaurant, a purchase of some beer, and a positioning of the automobiles, the four approached the apartment. As they neared the apartment, Thomas heard the sounds of several people. He placed himself near the door. Douglas, fearing a break-in, ran to the bedroom, returning with a shotgun. He stood in front of the door armed with the shotgun and a pistol which he pulled from his belt. After repeated inquiries by Thomas as to who it was, during which Joe Wood's three companions returned to their car, Joe Wood convinced him he was alone. Yet, as a precautionary measure, Douglas made Joe Wood crawl through a small window next to the front door. During all this Douglas remained armed with two weapons, pointed at the incoming Wood.

Once Joe Wood was in the room, Douglas was convinced the situation had returned to normal, and announced his intention to resume the game (approximately eighteen hundred ($1,800) was on the table at this time). At this point, Robert Wood expressed his desire to quit and leave but Douglas still armed with two weapons, would not so agree, and he stated that the game would continue until the money on the table was completely won or lost. Reluctantly Robert Wood sat down.

The game having been resumed for only five to ten minutes, Joe Wood arose, and asked permission to go into the bathroom. He exited the bathroom armed with a derringer, and

walked behind Douglas, ordering Thomas and him to lie on the floor. Thomas quickly responded, but Douglas remained sitting. Joe Wood then handed the derringer to his brother, who remained stunned at these totally unexpected actions (Robert Wood testified he did not even know his brother was armed, especially since he was fiercely quizzed by Douglas as he crawled in through the window). Joe then darted out the door, leaving it open.

At this point, Thomas in an effort to avoid any shooting, rose from the floor, telling Robert Wood "that they had to talk this thing out", and went to the front door, where he closed and locked it. As he was returning toward the poker table, Douglas made a move for the pistol in his belt, and Robert Wood "spun around and snapped one shot" into Douglas' chest.

Within seconds after the shooting, the three armed men kicked in the door and one of them fired a shot at Robert Wood because he was armed, the bullet landing in the wall above his head. (The record demonstrates that after Joe Wood exited the apartment, he called to his three companions who came running from their nearby car.) One of the three searched Thomas, taking from him a knife and eighty ($80) dollars. Robert Wood then took all the money on the table (some two thousand ($2,000) to two thousand five hundred ($2,500) dollars) and stuffed it in his pockets. Everyone then exited with the exception of Thomas who remained behind to attend to Douglas.

Four of the five respondents then met at the apartment of Isaiah Hamilton, where the weapons were hidden, and Hamilton and Randolph were given fifty ($50) dollars apiece. Pickens, who had left the car prior to arriving at Hamilton's apartment, received no money.

Subsequent to the incident, all five respondents were either arrested or surrendered themselves to Memphis police. State-

ments were taken from all except Joe Wood. At the trial only Robert Wood took the witness stand. The statements of Hamilton, Pickens, Randolph and Robert Wood, all being found by the trial judge to have been freely and voluntarily given, were admitted into evidence through the testimony of several officers of the Memphis Police Department.

In an effort to comply with the rule enunciated in *Bruton v. United States, supra,* the trial court and all counsel diligently attempted a program of redaction for each of the total four statements. These efforts are revealed through several entire volumes of the bill of exceptions. In short, any reference by one defendant as to another defendant was replaced with "blank" or "another person." The Court of Criminal Appeals, in its majority opinion found this particular type of redaction to be inappropriate and not in full compliance with the *Bruton* rule.

In summarized form, as to the crucial facts, the evidence reveals:

(1) that Tommy Thomas witnessed the felonious actions of Joe Wood, Randolph, Pickens and Hamilton, and he saw Robert Wood actually shoot William Douglas.

(2) that Robert Wood took approximately two thousand ($2,000) dollars from the poker table;

(2) that the actual physical shooting preceded the ultimate robbery by only a few seconds;

(4) that Robert Wood fired upon Douglas after the latter reached for a pistol in his belt.

(5) that all the respondents were operating under a scheme of some proportions to retrieve the money lost by Robert Wood to William Douglas.

Based upon these presented facts, all five (5) defendants were convicted of murder in the perpetration of a robbery, § 39-2402

T.C.A. On appeal the Court of Criminal Appeals in a split decision reversed and ruled:

> There is nothing to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confessions of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.
>
> [Court of Criminal Appeals opinion, p. 3. Judge Mitchell dissented as to this ruling, stating that the facts clearly demonstrated an overall robbery plan, and that the jury's finding of guilt is not overcome by a preponderance of the evidence, citing *State v. Grace*, 493 S.W.2d 474 (1973)].

II

We cannot concur with the majority's assessment of evidence on the issue of felony-murder.

In his multi-volume work on criminal law and procedure, Wharton defines the felony-murder rule at § 251 as follows:

> A murder committed in the course of the perpetration of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of a felony, even though the killing is unintentional and accidental.

> *Wharton's Criminal Law and Procedure* Vol. 1 (1957).

This concept of implied or imputed malice was statutorily recognized in Tennessee in 1829 with chapter 23 of the Public Acts of that year which ultimately produced § 39-2402 T.C.A. This statute now reads in pertinent part:

> 39-2402. *Murder in the first degree.*—An individual commits murder in the first degree if:
>
> * * * * * * *
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, *robbery*, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. (Emphasis supplied)

In applying § 39-2402 T.C.A. the courts of this State have consistently held that killing is murder in the first degree, regardless of whether malice and premeditation are proven, where such is done in the commission of a robbery. *Phillips v. State*, 2 Tenn.Crim.App. 609, 455 S.W.2d 637 (1970). *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932).

Additional cases offer more definitive treatment of the felony-murder rule. Quoting from *Wharton on Homicide*, this Court in the case of *Smith v. State*, 209 Tenn. 499, 354 S.W.2d 450 (1961) pronounced:

> Where a person is killed by another in perpetrating, or attempting to perpetrate, a felony or criminal act calculated to cause death, the premeditated intent to commit a felony or other criminal act is, by implication of law, transferred from that offense to the homicide actually committed, so as to make the latter offense a killing with malice aforethought constituting murder in the first degree. In such

case the turpitude of the criminal act supplies the place of deliberate and premeditated malice and is its legal equivalent and the purpose to kill is conclusively presumed from the intention which is of the essence of the criminal act intended. And such a murder is a murder in the first degree under such statutes, though it is casual and unintentional.

354 S.W.2d at 450, 451

The killing must have been done in pursuance of the unlawful act, and not collateral to it; it must have an intimate relation and close connection with the felony and not be separate, distinct and independent from it. *Farmer v. State*, 201 Tenn. 107, 296 S.W.2d 879 (1956). For the felony-murder to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony. *Wharton*, § 252, *supra*.

However, it is not necessary that the defendants believe that death would result. As pronounced by Justice Felts, when speaking for this Court in *Dupes v. State*, 209 Tenn. 506 354 S.W.2d 453 (1962):

> A murder committed in the perpetration of or attempt to perpetrate, 'robbery', is murder in the first degree. (T.C.A. § 49-2402).
>
> When they thus entered upon a common design to commit a felony, the natural and probable consequences of which involved the contingency of taking human life,[2] all were responsible for the acts of each committed in furtherance of such design even though the killing was not specifically contemplated. (citations omitted)
>
> 354 S.W.2d at 456

[2] Historically, the felony-murder doctrine applies only to felonies that are inherently or foreseeably dangerous to human life, of which robbery is unanimously included. See Annotation, Felony Murder—"Dangerous" Felonies, 50 A.L.R.3d 397.

Although the cumulative import of the evidence as recited above is that no physical harm was planned as to the deceased, each and every defendant either through words or actions demonstrated his knowledge that "killing may be necessary." Each foresaw the probable consequence of homicide.

The majority opinion by the Court of Criminal Appeals seemed to view the timing of the events as the crucial factor in their conclusion of the non-application of the felony-murder doctrine. The fact that the shooting was prior to the actual taking of money from the apartment was controlling in their minds. We feel that this limited "timing" analysis is an oversimplification of the felony-murder rule, and is contrary to the law in this State.

In *Smith v. State, supra*, this court applied the concept of "res gestae" to the issue of felony murder. In that case the defendant argued that the killing which occurred prior to the actual taking of any money, was not done in pursuance of the robbery, but collateral to it. The facts of the case were that the defendant upon entering a liquor store informed the proprietor, who was positioned behind the counter, of his intentions of robbery. When refused money, defendant drew a pistol. The proprietor also drew a gun and attempted to fire it at the intruder, to which the defendant retaliated with a deadly shot to the chest of the store owner. This Court, in rejecting defendant's argument that the homicide was collateral to the robbery, stated:

> We think that unquestionably this killing was done and is part of the *res gestae* of the whole acts embracing the

robbery. It had a close and intimate connection with the felony and grew out of the attempt to commit the felony.

354 S.W.2d at 452.

(This application of "res gestae"[3] to cases of felony-murder has been recognized in eighteen (18) additional jurisdictions. See Annotation, Felony Murder Rule—"Termination of Felony" 58 A.L.R.3d 851).

The felony-murder rule applies when the killing occurs during the commission of or the *attempt to commit* the felony. *Wharton* §251, *supra; Smith v. State, supra.* The evidence demonstrates that each defendant was carrying out or attempting to carry out a scheme of robbery. During the attempt to activate this plan, the deceased was shot and subsequently died; a natural and foreseeable consequence of activity which endangers human life. By the agreement between the defendants to pursue the illegal action of a robbery, the act of one co-conspirator (Robert Wood) in pursuance of that purpose was an act for which criminal liability attached to each defendant. *Williams v. State,* 164 Tenn. 562, 51 S.W.2d 482 (1932); *Dupes v. State, supra,* and *Wharton* §251, *supra.*

There remains one tangential issue, derivative of the felony-murder rule in this case. Defendant Robert Wood claims that he shot the deceased only after he reached for a gun in his belt. The testimony of Tommy Thomas corroborates this version of the homicide. However, this implied formulation of a self-defense theme is inappropriate in a felony-murder case.

---

[3] There are numerous decisions from multiple jurisdictions which apply the felony-murder doctrine to homicides which occur after the actual commission of the felony, eg. during the escape. The separation of time and/or place between the felony and the homicide is usually answered by ruling that the delayed homicide was part of the res gestae or in pursuance of felony. (See 58 A.L.R.3d 851, *infra* at section 6.) This case presents the inverse situation wherein the homicide precedes the actual commission of the felony. However, the application of the principle of res gestae is equally appropriate.

This Court answered this particular proposition in *Smith v. State, supra,* holding that a robber could not claim self-defense in a prosecution for first degree murder committed during such robbery, because:

> Under such circumstances when one brings on the act by approaching another with a gun and demands money, he is not, should not, and cannot be in a position to say, 'Well, I killed him because I thought he was going to shoot me.' He is the instigator and author and brings about the whole chain reaction, and thus cannot defend on this ground.
>
> 354 S.W.2d at 452

III

The latter, and equally difficult issue of this case is a consideration of the admission of certain evidence in light of the holding in *Bruton v. United States, supra.*

As noted previously, each of the statements given to Memphis police authorities by Robert Wood, Randolph, Pickens and Hamilton, were admitted through the testimony of the interrogating officer. And, as cited, each went through a laborious process of redaction, whereby references by the confessing defendant as to the other defendants were replaced with "blank" or "another person.

It should be stressed that Robert Wood's inculpatory testimony (in direct variance to his confession wherein he stated that Randolph, Pickens and Hamilton shot Douglas and robbed the game) went way beyond the replaced references to him within the statements of Randolph, Pickens and Hamilton, for none of them actually witnessed the shooting. And, in addition, the record reveals that the confessions of these three were strikingly similar in content, both in their original and redacted versions.

In the *Bruton* case, two co-defendants Evans and Bruton, were jointly tried on a federal charge of armed postal robbery. Although Evans did not testify, a prior oral confession by Evans, implicating both Bruton and him, was admitted through the testimony of a postal inspector. The trial court instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against Bruton and must be disregarded in determining the guilt or innocence of Bruton. In light of the trial court's limiting instructions, Bruton's conviction was affirmed by the Eighth Circuit Court of Appeals. On certiorari, the United States Supreme Court reversed as to Bruton's conviction.

The full import of this decision can best be demonstrated through several extracted portions of the opinion, which will follow a brief examination of the evolution of the *Bruton* rule.

The *Bruton* case presented the identical question considered by the United States Supreme Court in *Delli Paoli v. United States,* 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), i.e., whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a co-defendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence. In a 5-4 opinion the Court ruled that under appropriate instructions to the jury protecting the implicated defendants, the admission of such a confession was not reversible error. The basic premise upon which the *Delli Paoli* decision rested was the belief that it was fair to proceed under the assumption that the jury was capable of following the judge's repeated admonitions concerning the utility of the confession. 352 U.S. 239.

Between the *Delli Paoli* and *Bruton* decisions, the United States Supreme Court confronted an analogous situation in *Douglas v. State of Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). In that case, a mutually inculpatory confession by one defendant was admitted into evidence at the separate trial of a co-defendant. The defendant at the later trial was denied the opportunity to cross-examine his accuser because he had exercised his Fifth Amendment privilege. The Court reversed the conviction, ruling that such a procedure denied the defendant "the right of cross-examination secured by the Confrontation Clause," 380 U.S. 419 (relying upon *Pointer v. State of Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923).

With this particular case law development in mind, the Court in *Bruton* reasoned:

> *Delli Paoli* assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence. But . . . that assumption has since been effectively repudiated.
>
> 391 U.S. at 128 (with reference to the *Pointer v. Texas, supra.* and *Douglas v. Alabama, supra.* decisions).

Adopting the language of Justice Frankfurter in his dissent in *Delli Paoli* as to the jury instructions the Court pronounced:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose of a legal protection to defendants against whom such a declaration should not tell."
>
> *Id.* at 129.

Recognizing the attack that its ruling would have upon the viability and vitality of the jury system, the Court pointed out:

> *Not* every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoid-

able through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that *in many* cases, the jury can and will follow the trial judge's instructions to disregard such information. (Emphasis supplied)

Id. at 135

Yet the Court concluded with explicit reaffirmance that a confession which inculpates a co-defendant, yet evades confrontation is inadmissible hearsay and, standing alone is reversible error. This firm conclusion is inescapable from a reading of the following pronouncements:

> Nevertheless . . . *there as some contexts* in which the risk that the jury *will not, or cannot,* follow instructions is so great, and the consequences of failure so vital to the defendant, *that the practical and human limitations of the jury system cannot be ignored.* (Emphasis supplied)
>
> *Id.* at 135
>
> * * * * * * * *
>
> Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. *The effect is the same as if there had been no instruction at all.* (Emphasis supplied)
>
> *Id.* at 137

Following the *Bruton* decision, an exception to the application of this rule emerged through two particular decisions. Both *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), and *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972), stand for the

proposition that a violation of the Bruton rule in the course of a trial does not require reversal, if evidence of guilt is so overwhelming, that the prejudicial effect of the co-defendant's admission is so comparatively insignificant as to clearly be harmless error. (In each of these cases, the evidence of overwhelming guilt was in major portion, a product of the defendant's own confession.) This "overwhelming evidence" exception has been recognized by the courts of this State. *Taylor v. State,* 493 S.W.2d 477 (Tenn.Crim.App. 1972).

However, prior to this recognition of the exception pronounced in *Harrington v. California, supra,* the Tennesse Court of Criminal Appeals had carved out an additional judicial limitation to the application of the *Bruton* rule. In the opinion of *O'Neil v. State,* 2 Tenn.Crim.App. 518, 455 S.W.2d 597 (1970), the court, in applying the *Bruton* doctrine to a situation where all co-defendants made inculpatory, intertwining confessions, yet none testified, stated:

> In this record under these facts and circumstances, with Bruton v. United States, supra, in mind, to say this was error, i.e., violative of the confrontation clause of the Sixth Amendment, to allow these statements to be used in evidence we believe not.
>
> * * * * * * * *
>
> We are of the opinion this is one of the contexts in which the jury under the facts and circumstances developed could obey and follow the instructions of the court as found in this record.
>
> 455 S.W.2d at 603

This pronouncement was relied upon as direct precedent in a subsequent case, *Briggs v. State,* 501 S.W.2d 831 (Tenn. Crim.App. 1973), for the legal proposition that the *Bruton* rule is inapplicable where all of the jointly tried co-defendants

confess.[4] We reiterate the observation recently made by Justice Cooper while speaking for this Court in *State v. Elliott*, 524 S.W.2d 473 (Tenn. 1975):

> We think this statement is an over-simplification of the impact of the *Bruton* rule.
>
> 524 S.W.2d at 477

The facts of this case, when combined with the particular pattern of confession and testimony by the various defendants, present a hybrid *Bruton-Schneble-O'Neil* problem.

The major criterion for the *Bruton* application is satisfied through the admissibility of confessions of the defendants, implicating their various co-defendants, without such co-defendants being afforded the opportunity of a cross-examination of their accusors.

Yet, the "overwhelming guilt" exception to *Bruton* announced in *Schneble v. Florida, supra,* also has direct application to defendants, Robert and Joe Wood. Robert's own testimony establishes his guilt with greater specificity than do any of the three redacted confessions (either singly or cumulatively) of his co-defendants. (This is especially true since the confessing co-defendants had no visible knowledge of the actual homicide.) In addition, Robert's version of the homicide is corroborated in detail by the testimony of the eye-witness Tommy Thomas. Robert Wood's effort to plead self-defense is inappropriate, *Smith v. State, supra*; and his guilt is demonstrated through "overwhelming evidence", thus causing any possible *Bruton* violation to be harmless error. *Schneble v. Florida, supra.*

---

[4] There is a clear division among the jurisdictions as to the proper *Bruton* analysis in a situation where two or more co-defendants make mutually inculpatory, interlocking confessions which are admitted at trial. Courts have ruled that such admission is: (1) erroneous; (2) erroneous but harmless error; and (3) not erroneous. See Annotation, Confrontation Clause—Bruton Rule, 29 L.Ed.2d 931, 981-989.

This "overwhelming guilt" analysis also has application to the guilt or innocence of defendant, Joe Wood. The testimony of both Robert Wood and Tommy Thomas (who were subject to cross-examination) reveal Joe Wood as the initial instigator of the actual felony-murder. In addition, independent evidence (through several State witnesses who were neighbors of Woppy Gaddy) places Joe Wood at the entrance to Gaddy's apartment prior to and immediately following the shooting. Also, the record reflects that the confessions of Hamilton, Pickens and Randolph were sufficiently "cleansed" of any direct references to Joe Wood. And he did not suffer under the potential burden of group identification as did the three enlisted participants. Even accepting that the cumulative import of the three confessions caused some prejudice to attach to Joe Wood, their admissibility was harmless error in light of the overwhelming evidence against him, *Schneble v. Florida, supra.* His guilt in the felony-murder was properly established.

Finally, the interlocking inculpatory confessions of Randolph, Pickens and Hamilton is a situation akin to that addressed in *O'Neal v. State, supra.* The confessions of Randolph, Pickens and Hamilton clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme. As pointed out by this Court in *State v. Elliott, supra*:

> The fact that jointly tried co-defendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects . . .
>
> 524 S.W.2d at 478

This observation is more clearly understood through a direct comparison of such a situation to the facts from which *Bruton* emerged. As noted previously, *Bruton* involved a situation where the co-defendant through a confession (and not testimony) implicated the defendant in contradiction and re-

pudiation to the defendant's testimony. Unlike *Bruton*, and like *O'Neil*, this case includes a situation where three co-defendants confess with similar, intertwining versions of their own actions. The contradictions and repudiation found in *Bruton*, upon which the prejudicial deprivation of confrontation rests, is simply not present. See *United States ex rel. Dukes v. Wallack*, 414 F.2d 246 (2nd Cir. 1969). Added to this, in the instant case, is the fact that Robert Wood through direct testimony identified Randolph, Pickens and Hamilton as the three other participants. The guilt of this trio was presented to the jury without any prejudice attaching under a *Bruton* analysis. A defendant is entitled to a fair trial but not a perfect one. *Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953). Such was afforded these five defendants.

Accordingly, the decision of the Court of Criminal Appeals is reversed, and the convictions of each defendant, as determined by the jury, is affirmed.

Per Curiam.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
JAMES RANDOLPH

Full Name and Prison Number
(if any) of Petitioner

vs.

CHIEF HARRY PARKER
Name of Respondent
(Jailor, Warden)

Case No. 76-68

(To be supplied by Clerk, U. S. District Court)

This case assigned to Bailey Brown, Judge

PETITION FOR WRIT OF HABEAS CORPUS

(Filed February 20, 1976)

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. Even though you may be allowed to file your petition on a pauper's oath, costs may be adjudged against you and execution issued if it later appears that you have sufficient funds.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Building
Memphis, Tennessee 38103

Petitions Not Conforming to These Instructions
Will Be Returned

1. Place of detention: Shelby County Jail

2. Name and location of court which imposed sentence: Shelby County Criminal Court, Div. I, City

3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:

(a) Ind. No. 27222 Murder in the Perpetration of Robbery

(b)

(c)

4. The date sentence was imposed and the terms of the sentence:

(a) Life; Jan. 1971

(b)

(c)

5. Check whether a finding of guilty was made:

(a) after a plea of guilty ....

(b) after a plea of not guilty √

(c) after a plea of *nolo contendere* ....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury √

(b) a judge without a jury ....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If your answer to 7 was "yes" list the following:

(a) the name of each court you appealed to:

I. Tenn. Criminal Court of Appeals

II Tenn. Supreme Court

(b) the result in each court you appealed to:

I Reversal

II Reversal; overturned

(c) the date of each such result:

I March—1973

II Dec.—1975

(d) citations of any written opinions or orders entered pursuant to such results, if known:

I .....

II .....

9. If your answer to number 7 was "no," give your reasons for not appealing:

.....

10. Have you filed previous motions under 28 U.S.C. 2255, habeas corpus petitions or any other applications, petitions or motions with respect to this conviction?

.....

11. If you answered "yes" to number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I .....

II .....

III .....

IV .....

(b) the specific nature of each petition, motion or application:

I .....

II .....

III .....

IV .....

(c) the disposition of each petition, motion or application:

I .....

II .....

III .....

IV .....

(d) the date of each such disposition:

I .....

II .....

III .....

IV .....

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I .....

II .....

III .....

IV .....

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

I. Perjured Testimony (14th amendment).

II. Denial of Assistance of Counsel (6th amendment)

III. Ineffective Assistance of Counsel (6th amendment).

IV. Denial of Fair Trial (7th amendment).

V. Denial of Fair Trial (7th amendment).

VI. Denial of Equal Protection of the Law (14th Amendment).

13. State concisely and in the same order the facts which support each of the grounds set out in number 12. Do not cite cases except those in which you were involved.

I. Petitioner was arrested July, 1970 on a Shelby County Grand Jury indictment. This indictment in nature was based on the false or perjured testimony given by Mr. Robert Wood. Mr. Woods later confessed to the murder and robbery and stated that he had to frame petitioner because he (Mr. Woods) believed that the murdered victim's friends would murder him (Mr. Woods). Therefore to save his own life, Mr. Woods framed petitioner and therefore resulted in Due Process denial for petitioner.

II. Petitioner requested for counsel while in MPD interrogation but was denied request. Therefore manufactured evidences and the theft and or loss of all original records of the original interrogation occurred. Had petitioner been granted attorney, petitioners rights would have been protected.

III. Petitioner's counsel on record, refuses to allow petitioner access of the Appellate and Tenn. Supreme Court's Opinion and therefore counsel is proving ineffective because petitioner is not informed by his counsel as he should be, to the grounds of the Court's Opinion and is therefore unable to perfect this petition.

IV. Petitioner's counsel requested an order to enter into evidence during trial, all the original records and tape recordings that took place in MPD interrogation. It was learned that Lt. Wolf (MPD) was fired for selling petitioner's records to the True Detective Magazine. Therefore evidence to prove petitioner's innocence was not available during trial and therefore denied petitioner of fair and impartial trial.

V. Petitioner contends that false testimony and or perjured testimony was the basis of his indictment and by the foundation (indictment) being founded in falsehood, petitioner's trial was based on falsehood. Therefore petitioner could not and did not have a fair trial, because in truth, petitioner should have never been tried in the first place, therefore the trial was unfair.

VI. Petitioner contends that Mr. Woods framed petitioner because he (Mr. Woods) was in fear of his life. I believe that it is the duty of the entire tribunal (law enforcement officers, Grand Jurors, attorneys, prosecutors, and Judges to safe guard the rights of all the people. And since steps were not taken to safe guard petitioner's rights, Due Process and Equal Protection was overlooked, resulting in harm to petitioner.

14. Has any ground set forth in number 12 been previously presented to this or any other federal court by way of motion under 28 U.S.C. 2255, petition for writ of habeas corpus or any other petition, motion or application? .....

15. If your answer to number 14 is "yes" identify:

(a) which grounds have been previously presented

I .....
.....

II .....
.....

III .....
.....

(b) the proceedings in which each ground was raised

I .....
.....

II .....
.....

III .....
.....

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction? . . . . . .

17. If your answer to any part of Number 15 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Mr. Robert Smith
206 Dermon Bldg.; City

II Mr. Robert Smith
206 Dermon Bldg.; City

III Mr. Robert Smith
206 Dermon Bldg.; City

(b) the proceeding in which such attorney represented you:

I Arraignment

II Trial and Sentencing

III Appeal

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ JAMES RANDOLPH
(Signature of Petitioner)

Forma Pauperis Affidavit

I, James Randolph, being duly sworn according to law, depose and say that I am the petitioner in the above proceeding; that the matters stated in the foregoing petition are true; that I am unable to pay the costs or give security for said proceedings and that I believe I am entitled to redress.

/s/ JAMES RANDOLPH
Signature of Petitioner

Sworn to and subscribed before me this the 13 day of February, 1976.

/s/ DAVID FIELD
Notary Public

My Commission Expires: June 27, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James Randolph and Wilburn Pickens,
Petitioners, pro se

vs.

Chief Harry Parker,
Respondent.

Civil C-76-68

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

(Filed Feb. 27, 1976)

Comes now your petitioners, James Randolph and Wilburn Pickens, co-defendants of the offense in controversy, amends to the original petition for writ of habeas corpus as ordered by the Chief Judge of Western District Court, Feb. 23, 1976.

I

Petitioners are not sure as to what grounds were raised by petitioner's counsels in trial court and on appeal. The reason for this lack of knowledge is because petitioners counsels refused to communicate with petitioners concerning proceedings. Petitioners requested to counsels for copies of Motion for New Trial, Brief in the appeals courts, etc., and were denied request and assistance.

II

Petitioners believe that all the grounds set forth in petition for Writ of Habeas Corpus are true and hopes for relief.

III

However, petitioners did write to the Clerk, Tennessee Criminal Court of Appeals and requested an "opinion". Petitions do have in possession the "opinion" and will do our best to comply with the Chief Judge's order dated Feb. 23, 1976.

IV

The "opinion" wrote, "This case presents two principal issues, viz: (1) whether the facts justify an application of the "felony-murder" rule, and (2) whether admissibility of certain confessions of the co-defendants constitute a violation of the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The five defendants were convicted of murder in the perpertation of robbery and were sentenced to life imprisonment. The Court of Criminal Appeals reversed and remanded for a new trial."

Wherefore petitioners hopes that this amendment petition is in compliance with the Chief Judge's court order.

Petitioners humbly request the honorable court to please notify petitioners if further amendments are required.

Respectfully submitted,

/s/ JAMES RANDOLPH and
/s/ WILBURN PICKENS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James Randolph,
Petitioner
v.
Chief Harry Parker,
Respondent
} Civil C-76-68

and

Wilburn Pickens,
Petitioner
v.
Chief Harry Parker,
Respondent.
} Civil C-76-69

ORDER OF CONSOLIDATION

It appearing to the court that in the interest of sound and efficient judicial administration the captioned cases should be consolidated for handling;

It is so ORDERED.

ENTER this 27th day of February, 1976.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

ORDER TO SHOW CAUSE

It appearing to the court that petitioners have made a reasonable effort to determine whether they have exhausted their remedies in state court, all as set out in the amendment filed to their petitions;

It is ORDERED that respondent show cause why the petitions and the relief prayed for therein should not be granted and, good cause appearing, respondent is allowed 23 days in which to answer.

It is further ORDERED that respondent file with his answer a copy of the transcript of the state criminal trial as well as any opinions on direct appeal.

ENTER this 27th day of February, 1976.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

RESPONSE TO ORDER TO SHOW CAUSE

The two cases above have been consolidated by order of this Court entered February 27, 1976. Therefore, Respondent will

reply to the Show Cause Order in the two cases, jointly. Respondent is also tendering to the Court, at this time, the lengthy trial transcript.

Introduction

These two petitioners, along with three co-defendants, Isaiah Hamilton, and brothers Robert Woods and Joe Woods, were convicted for the murder of a professional gambler by the name of William Douglas, and sentenced to life imprisonment.

Robert Woods had lost money to this gambler and importuned upon his brother, Joe Woods, to help him recover it. These two men were white. Joe Woods brought with him the two petitioners and Isaiah Hamilton, all three of whom were black, to a place where a card game was in progress, with the intent of robbing the game. Just as the three black men broke into the door, shooting guns, to rob the game, Robert Woods, who had a pistol on Douglas, thinking Douglas was going for his gun, shot and killed Douglas. All were convicted for this murder in the perpetration of a robbery. The Court of Criminal Appeals reversed, but the State Supreme Court reversed that Court, and affirmed the guilty verdicts.

There have been two basic questions raised in the petitions for habeas corpus before this Court.

I. Were the written statements admitted into evidence, which amounted to confessions by these two petitioners (as well as defendant Hamilton) coerced and therefore involuntary?

The statements were originally on tape and then reduced to writing by a stenographer. The written statements were admitted after a lengthy hearing out of the presence of the jury. Each statement was taken separately and ruled upon. Petitioner Randolph's statement can be found in the record beginning at page 583. Petitioner Pickens' statement can be found in the

record beginning at page 696. It will be noted that the statements were taken from each of these three black defendants separately, and despite this they were almost identical in substance. Respondent contends that the record supports the Trial Court's ruling and the admissibility of the statements.

II. The only other basic constitutional question raised is the allegation that petitioners were represented by ineffective counsel. That question was never raised in the State courts. No evidentiary hearing, therefore, has been provided concerning the allegations made in connection with this. Respondent respectfully insists that the Federal Court should abstain until the petitioners have exhausted their remedies in this regard in the State courts.

Response

The complaints in the two petitions are basically the same, however, stated somewhat differently. Petitioner Pickens alleges as grounds for the Habeas Corpus petition, as follows:

1) He was arrested and indicted on a false statement given by a co-defendant, Robert Woods, who later took the stand at the trial and gave a different version in testimony. Petitioner states, in connection with this, that Woods explained this by saying that he, Woods, had a murder contract out on him and that he framed the Petitioner in fear of his life.

2) Petitioner requested an attorney during interrogation and was denied one by the Memphis Police Department.

3) Petitioner was induced to make a false involuntary confession that was used in evidence against him.

4) Petitioner was not effectively represented by counsel.

Petitioner Randolph made the same complaints as those set out by Pickens, however worded somewhat differently, under

Assignments Nos. 1, 2, 3, 5 and 6. His Fourth assignment alletes that there were records of the proceedings during interrogation, including tape recordings which Lt. Wolf, of the Memphis Police Department, had sold to *True Detective Magazine*, and were not available for the trial, but Lt. Wolf was fired for this conduct. He states that his counsel requested an order of the court to produce such recordings but they were not available.

Petitioners, therefore, are basically insisting three things:

(1) They were indicted on false information given by a co-defendant.

(2) Their statements or confessions were involuntarily given or coerced, and should not have been admitted into evidence; and

(3) That they had ineffective counsel.

Petitioner Randolph alone claims that pertinent records were missing as a result of conduct of the police department.

The Respondent denies each of these allegations.

First—there is nothing in the record, nor could there be, to show why the defendants were indicted. There is nothing but the bare self-serving allegations of these petitioners that Robert Wood gave the police his first statement for any purpose prejudicial to the defendants or because he thought that there was a contract on him and feared for his life.

Second—the question concerning the involuntariness of the written confession given by these two petitioners (as well as the other defendants) were raised at the trial. An evidentiary hearing outside the presence of the jury was held and the Court found that the statements were voluntarily given. Respondent submits that the record supports this. Before admitting the statements into evidence all reference to other defendants were deleted. This action and the deletion thereon, was upheld by the

Court of Criminal Appeals, even though it reversed the case on a different basis. The Supreme Court dealt with this assignment in the same manner in reversing the Court of Criminal Appeals on the other ground. A copy of the opinion of the State Court of Criminal Appeals, and the State Supreme Court's opinion are both attached hereto as Exhibits "A" and "B", respectively.

In response to the contention that the defendants were ineffectively represented by counsel, Respondent would point out that this has never been raised in the State courts, and would respectfully insist that these petitioners should have raised this issue in the State courts so that an evidentiary hearing could be held, before presenting it to this Honorable Court, and that this Court should abstain from considering this assignment until the State remedies have been exhausted.

In response to the final complaint made by Petitioner Randolph, Respondent would say that there is nothing in the record to indicate that Randolph's assignment No. 4, concerning the so-called missing records was, likewise, ever considered in the State courts, but that it is nothing but a conclusory allegation not supported by the record.

Having thus fully responded to the Show Cause Order, the Respondent respectfully insists that the petitions should be denied.

ROBERT H. ROBERTS
Advocate General
State of Tennessee

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

ORDER OF REFERENCE TO MAGISTRATE

UPON CONSIDERATION, it is ORDERED that the captioned causes be referred to the Magistrate for a study, report and recommendation.

ENTER this 17th day of March, 1976.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

Isaiah Hamilton No. 78360 Full Name and Prison Number (if any) of Petitioner vs. Chief H. L. Parker Name of Respondent (Jailor, Warden)	Case No. C-76-310 (To be supplied by Clerk, U.S. District Court)

PETITION FOR WRIT OF HABEAS CORPUS

(Filed July 1, 1976)

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be legibly handwritten or typewritten, signed

by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may complete the answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make clear which question any such continued answer refers to.

If you challenge more than one conviction or sentence, you must do so by separate petitions unless your claims for relief arise out of the same proceeding.

A petition is not a legal brief. Refer only to cases you were involved in leading up to this petition. You may file a separate memorandum of authorities.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis* (on a pauper's oath) it shall include an affidavit (attached to the back of this form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

When the petition is completed, the *original and two (2) copies* shall be mailed to:

Clerk, United States District Court
Western District of Tennessee
Federal Bldg., 167 N. Main Street
Memphis, Tennessee 38103

Petitions Not Conforming to These Instructions Will Be Returned

1. Place of detention: Shelby County Jail.

2. Name and location of court which imposed sentence: Shelby County Criminal Court—Div. 1.

3. The indictment number, or numbers, if known, connected with the offense or offenses for which sentence was imposed:

(a) No. 27222

(b) .....

(c) .....

4. The date sentence was imposed and the terms of the sentence:

(a) January 25, 1972

(b) Life in Prison

(c) .....

5. Check whether a finding of guilty was made:

(a) after a plea of guilty .....

(b) after a plea of not guilty X

(c) after a plea of *nolo contendere* .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury X

(b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If your answer to number 7 was "yes" list the following:

(a) the name of each court you appealed to:

I Court of Criminal Appeals

II Tennessee Supreme Court

(b) the result in each court you appealed to:

I Reversed and Remanded

II Reversed and Affirmed

(c) the date of each such result:

I do not know exact date

II December 15, 1975

(d) citations of any written opinions or orders entered pursuant to such results, if known:

I didn't receive any

II 12-15-75, written opinion

9. If your answer to number 7 was "no", give your reasons for not appealing: .....
.....
.....

10. Prior to this petition have you filed any of the following with respect to this conviction:

(a) any petition for habeas corpus in state or federal courts? No

(b) any petition in state court under any post conviction procedure laws? No

(c) any petition in state court by way of *coram nobis*? No

(d) any petition in the United States Supreme Court for certiorari other than petitions, if any, already given in answer to number 8? No

(e) any other petitions, motions or applications in this or any other court? No

11. If you answered "yes" to any part of number 10, list the following with respect to each petition, motion or application:

(a) the name and location of the court in which each petition, motion or application was filed:

I .....

II .....

III .....

IV .....

(b) the specific nature of each petition, motion or application:

I .....

II .....

III .....

IV .....

(c) the disposition of each petition, motion or application:

I .....

II .....

III .....

IV .....

(d) the date of each such disposition:

I .....

II .....

III .....

IV .....

(e) citations of any written opinions or orders entered pursuant to each such disposition, if known:

I .....

II .....

III .....

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Do not cite cases except those in which you were involved.

1. Petitioners constitutional right was violated under the Fifth Amendment.

2. Petitioner was denied his constitutional rights under the Sixth Amendment.

3. Petitioners constitutional rights were violated under the Fourth Amendment.

13. State concisely and in the same order the facts which support each of the grounds set out in number 12. Do not cite cases except those in which you were involved.

(1) Petitioner was not advised of constitutional rights at the time of his arrest and interrogation; which subsequently led to an involuntary confession, which was ruled admissible at petitioner's trial. Petitioner at the time of his arrest was unable to read or write, and to this very day is unable to read or write.

(2) Petitioner requested for a fast and speedy trial, but was denied this right which the Sixth Amendment grants.

Petitioner states that the pre-trial publicity against him violated his right to a fair and impartial trial.

Petitioner states that Mr. Cassell was ineffective as his counsel.

(3) A false statement, which was illegally seizured, was used against petitioner. This illegally seizured statement was the basis of petitioner's arrest, and subsequent trial and conviction.

14. Has any ground set forth in number 12 been previously presented to this or any other court, state or federal, in any petition, motion or application? Yes.

15. If your answer to number 14 is "yes", identify:

(a) which grounds have been previously presented

I Petitioner was not advised of his constitutional rights.

II Petitioner was denied a fast and speedy trial. The pre-trial publicity violated a fair trial.

III The illegally seizured statement violated petitioner's constitutional rights.

(b) the proceedings in which each ground was raised

I Trial and Motion for a New Trial.

II Appeal to Court of Criminal Appeal.

III Appeal to Tennessee Supreme Court.

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction?

17. If your answer to any part of number 16 was "yes" list the following:

(a) the name and address of each attorney who represented you:

I Charlie Cassell
100 N. Main Bldg.

II .....

III .....

(b) the proceeding in which such attorney represented you:

I Arraignment and plea

II Trial and sentencing

III Appeal

18. If you are seeking leave to proceed *in forma pauperis* (on a pauper's oath), have you completed the sworn affidavit setting forth the required information (see instructions at the beginning of this form)? Yes

/s/ ISIAH HAMILTON
(Signature of Petitioner)

State of Tennessee
County of Shelby

Isiah Hamilton, being first duly sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ ISIAH HAMILTON
(Signature of Affiant)
(Petitioner)

Subscribed and sworn to before me this 1st day of July, 1976.

/s/ DAVID E. TODD
Notary Public
My commission expires:
9-10-77

———

Forma Pauperis Affidavit

I, Isiah Hamilton, being duly sworn according to law, depose and say that I am the petitioner in the above preceeding; that I am unable to pay the costs or give security therefor, and that I believe I am entitled to redress.

/s/ ISIAH HAMILTON
Signature of Petitioner

Sworn to and subscribed before me this 1st day of July, 1976.

/s/ DAVID E. TODD
Notary Public

My commission expires:
9-10-77

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Isaiah Hamilton

vs.

No. C-76-310

Chief H. L. Parker, Jailer.

ORDER TO SHOW CAUSE

(Filed July 7, 1976)

Petitioner, Isaiah Hamilton, acting pro se and in forma pauperis, filed a Petition for a Writ of Habeas Corpus seeking collateral relief from a life sentence imposed pursuant to a conviction in the Criminal Court of Shelby County, Tennessee.

The petition states that no post-conviction proceedings have been filed in the state courts. However, petitioner alleges that the constitutional issues which form the basis of the petition were raised and overruled in the trial and appellate courts of Tennessee. Therefore petitioner has alleged an exhaustion of state remedies except as hereinafter noted.

Petitioner alleges that his Fifth Amendment rights were violated by a failure to advise him of his rights before a statement was taken from him and later used against him, that his Sixth Amendment rights were violated because he was denied a speedy trial, and that his Fourth Amendment rights were violated because a false "statement was illegally seized" and used to arrest and convict him.

The petition also states that his attorney was "ineffective as his counsel." However, the petition also states that the named attorney represented the petitioner in his arraignment, trial, and appeal. As indicated above, there have been no post-conviction proceedings in the state court. This Court concludes that the named attorney did not raise the question of his ineffectiveness in the trial or appellate courts. Therefore, there has not been an exhaustion of remedies on that issue.

It appears to the Court that appropriate officials of the State of Tennessee should respond to the petition in order that this Court might determine if further proceedings are necessary.

It is therefore ORDERED that a response should be filed in behalf of those persons charged with keeping the petitioner in custody, and that this response have attached thereto as an exhibit a copy of the portion of the record in the state court proceedings, including a transcript of the same, if available, which is relevant to the issues properly raised by the petition. The Court being of the opinion that good cause exists for allowing additional time for the response, twenty-three days are allowed respondent to answer this petition.

It is FURTHER ORDERED that the Court will determine after the response is filed if it is necessary to appoint an attorney for the petitioner.

It is FURTHER ORDERED that upon the filing of the answer to this petition this Court will set a date for a hearing, if a hearing should appear necessary, said hearing to be held not more than five days after the answer is filed unless for good cause shown additional time is allowed.

It is FURTHER ORDERED that, in the event a hearing date is set as aforesaid, the Order will require respondent to produce the body of the petitioner in Court at the hearing.

Entered this 7th day of July 1976.

/s/ ROBERT M. McRAE, JR., Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

RESPONSE

Comes the respondent, by and through the Attorney General for the State of Tennessee, and for response to the show cause order in this matter would show unto this Honorable Court the following:

I

Petitioner is confined to the custody of the jailer of the Shelby County Jail in Memphis, Tennessee, pursuant to a judgment

rendered by the Shelby County Criminal Court, Division I, on January 25, 1972 finding the petitioner guilty of murder in the perpetration of robbery and sentencing him to life imprisonment.

II

In compliance with the order to show cause, the respondent is submitting this response and certified copies of the following documents to be filed herewith or as soon thereafter as possible:

(a) The Technical Record and Bill of Exceptions filed with the Supreme Court of Tennessee pursuant to the direct appeal of petitioner's conviction;

(b) The Opinion of the Court of Criminal Appeals of Tennessee reversing the conviction of the petitioner on June 5, 1974;

(c) The Opinion of the Supreme Court of Tennessee reversing the Court of Criminal Appeals and affirming the conviction of the petitioner on December 15, 1975;

(d) All appellate briefs filed on behalf of the petitioner pursuant to his direct appeal in the state courts.

III

As reflected by the order to show cause, the petitioner in his application for federal habeas corpus relief, has essentially presented four allegations wherein he asserts his constitutional rights have been violated. One of these allegations concerns what the petitioner alleges to be ineffective counsel. However, as reflected by the order to show cause, that issue has not yet been litigated through the state post-conviction procedure and therefore there has been no exhaustion of state remedies with regard to this issue. The remainder of this response will address the other three questions presented by the application for a writ of habeas corpus.

IV

Fifth Amendment Violation—The application for a writ of habeas corpus alleges that the petitioner's Fifth Amendment rights were violated by a failure to advise him of his rights before a statement was taken from him and later used against him. This allegation essentially formed the petitioner's fifth assignment of error before the Court of Criminal Appeals in his direct appeal. (See page 6 of Petitioner's Brief in the Court of Criminal Appeals). Although reversing on other grounds, the Court of Criminal Appeals of Tennessee considered this assignment of error and found it to be without merit. (See *Wood et al. v. State*, CCA at Jackson, Opinion Filed June 5, 1974, page 5). From the record, it is obvious that the trial court conducted a hearing and found that the statement was voluntarily made. All credible evidence and the record supports this conclusion. The courts of Tennessee have previously entertained and determined the issue here raised by the petitioner. There can be no doubt, that pursuant to 28 U.S.C. 2254(d), the burden is hereupon the petitioner to establish that the fact finding procedure employed by the state courts was not adequate to afford a full and fair hearing or that he did not receive a full, fair, and adequate hearing in the state courts, or that he was otherwise denied due process of law in the state court proceedings. The burden is upon petitioner to establish by convincing evidence that the factual and legal determination by the state courts was erroneous. The respondent submits that upon a review of the whole record, it is clear that the petitioner has failed to carry this burden and this allegation is without merit.

V

Sixth Amendment Violation—The petitioner contends in his application for federal relief, that his Sixth Amendment rights were violated because he was denied a speedy trial. The briefs filed on behalf of the petitioner in the appellate courts of Tennessee show clearly that the issue of a speedy trial was never raised by the petitioner in the appellate process of Tennessee. Clearly, this is an issue which the petitioner can present to the state courts of Tennessee by way of the State Post-Conviction Relief Act. Therefore, the petitioner has failed to exhaust his available state remedies and this allegation should be dismissed on those grounds.

VI

Fourth Amendment Violation—The petitioner also contends in his application for federal relief that his Fourth Amendment rights were violated because a "false statement was illegally seized and used to arrest and convict him". The only elaboration with regard to this contention appears on page 5 of the application for federal relief. Therein the petitioner states, "a false statement, which was illegally seized, was used against petitioner. This illegally seizured (sic) statement was the basis of petitioner's arrest, and subsequent trial and conviction". In responding to this allegation, the State would first contend that the allegation needs elaboration. It is extremely difficult to understand what the petitioner is actually perceiving as a violation of his Fourth Amendment rights.

In his direct appeal through the Tennessee appellate courts, the petitioner raised as assignment of error number seven a search and seizures issue. See petitioner's brief in the Court of Criminal Appeals, page 6, 7. In that assignment of error, the petitioner complained of a search and seizure of weapons from his apartment. The record shows that he gave written consent for an initial search. Nothing was found. He then drew a map showing where the records were and signed a second consent to search. The court found that that search was voluntary and consensual. The Court of Criminal Appeals found this assignment of error to be without merit. See *Wood et al. v. State, supra*, page 5. If indeed this is the search that the

petitioner is herein referring to, then that issue also has been fully heard and determined by the state courts of Tennessee and the petitioner here bears the same burden pursuant to 28 U.S.C. 2254(d) which was mentioned above. If the petitioner is raising a new search issue, then the respondent would submit that such an issue has not yet been presented to the state courts of Tennessee and therefore, the petitioner has failed to exhaust his state remedies. In either event, the respondent would submit that the allegation does not form at this time a sufficient basis upon which to issue a federal writ of habeas corpus.

WHEREFORE, FOR ALL THE ABOVE STATED REASONS, the respondent prays that the application for a writ of habeas corpus be denied and this action be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

James Randolph, Petitioner,
vs.
Chief Harry Parker, Respondent,
} Civil No. C-76-68

and

Wilburn Pickens, Petitioner,
vs.
Chief Harry Parker, Respondent.
} Civil No. C-76-69

PRELIMINARY REPORT ON HABEAS CORPUS APPLICATION

Both the petitioners, James Randolph and Wilburn Pickens, were jointly convicted in the Criminal Court of Shelby County, Tennessee for murder in the perpetration of a robbery and both given life sentences. Their convictions were reversed by the Tennessee Court of Criminal Appeals. On certiorari, the Supreme Court of Tennessee reversed the Court of Criminal Appeals and reinstated the judgment of the trial court. The present suit seeks federal habeas corpus relief under 28 U.S.C. 2254.

The opinions of both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, as well as the entire trial transcript of 962 pages, have been filed in response to this court's show cause orders. I have read the transcript of the proof

at the trial and compared it with the opinions of the appellate courts. The opinions of both the Court of Criminal Appeals and the Supreme Court accurately reflect the facts of the case as set out in the trial transcript, although those courts drew different legal conclusions from the facts.

Robert Hugh Wood engaged in a series of poker games with a professional, and apparently clever, gambler by the name of William Douglas, who was going by the name of Ray Blaylock. By cheating, Mr. Douglas relieved Robert Wood of a substantial sum of money. Wood suspected Douglas of cheating but could not prove it. To catch him, Wood got his friend Tommy Thomas, who was a good poker player, to play Douglas. As it turned out Thomas was a better friend of Douglas than the was of Wood, so he reported to Wood that Douglas was not cheating, as best he could ascertain. The games had been arranged by and held in the apartment of one Walter Lee (Whoppy) Gaddy, who was to get a fee for the use of his apartment and setting up Robert Wood.

A game was scheduled for July 6, 1970 at Gaddy's apartment between Wood and Douglas. Wood, still believing he was being cheated, solicited the aid of his brother, Joe Wood, to help him put things right. Robert told Joe that he was going to demand his money back, but that he expected Douglas, who would be armed, to be less than gracious about the matter, requiring the money to be extracted by force.

Joe Wood engaged the petitioners and Isaiah Hamilton (who is the petitioner in Cause No. C-76-310 presently pending in this court) to assist him. They were shown the apartment, told to rob the game, and promised a sum of money for doing so.

At Gaddy's apartment on the night of July 6, 1970 William Douglas, Robert Wood, Tommy Thomas, and Joe Wood assembled for a game of poker between Robert Wood and Douglas, Thomas and Joe Wood sitting in the room as spectators. Between 8:30 and 9:00 p.m. Joe Wood left the apartment for the stated purpose of obtaining more beer. He did buy some beer, but he also met with his three companions and brought them back to the apartment with him. As they approached the apartment Thomas stated to those inside that he thought he heard the sound of several people. Douglas, fearing foul play other than his own, went to the bedroom, got a shotgun, pulled a pistol from his belt, and positioned himself in front of the door. After Thomas asked several times who was there, Randolph, Pickens and Hamilton returned to their car. Joe then convinced those inside the apartment that he was alone. Douglas, however, still made Joe crawl through a small window next to the front door while he kept him covered by the two weapons. After Joe Wood returned to the apartment, Douglas announced that the game would continue until the money on the table was completely won or lost. Robert Wood, mindful of Douglas's belligerent nature and armed status, agreed to continue playing.

After the game had been resumed for a short while, Joe Wood went to the bathroom and came back brandishing a derringer. He ordered Douglas and Thomas to lie on the floor. Thomas obliged, but Douglas remained sitting at the table. Robert Wood testified that he was startled by these events, thinking that his brother was not armed. Joe Wood handed the derringer to Robert and ran out the door, leaving it open. Thomas, in a conciliation effort, arose from the floor, suggested to Robert that things be talked over went to the door, and closed and locked it. While this was going on Douglas made a move for the pistol in his belt, and Robert Wood turned and shot him in the chest. He died from the wound.

Joe Wood in the meantime had gone to a nearby car and called for Randolph, Pickens and Hamilton, who came back to the apartment. Within a few seconds after the shooting, Randolph, Pickens, and Hamilton, fully armed, kicked in the door and entered the apartment. One of them fired a shot at

Robert Wood, since he was armed, but the bullet landed in the wall above his head. One of the three searched Thomas, and took a knife and eighty dollars from him. Robert Wood took some $2,000 to $2,500 from the poker table and put it in his pocket. Everyone then left the apartment except Thomas, who remained for a short while.

Robert Wood, Joe Wood, Isaiah Hamilton, and James Randolph then met at Hamilton's apartment where the weapons were hidden and Hamilton and Randolph were paid $50 each. Pickens had left the car prior to arriving at Hamilton's apartment and received no money.

On this set of facts the state trial court found the petitioners, as well as Isaiah Hamilton, Robert Wood and Joe Wood, guilty of a felony-murder in violation of Tennessee Code Annotated 39-2402, which states, in partinent part, the following:

> 39-2402. *Murder in the First Degree*—An individual commits murder in the first degree if * * *
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, ??acing or discharging of a destructive device or bomb.

They were each sentenced to life imprisonment.

The Court of Criminal Appeals in reversing the trial court, found that there was nothing in the record to indicate that "the shooting took place as part of or in perpetration of the robbery of the deceased," and emphasized the fact that the shooting was accomplished prior to the actual robbery.

The Supreme Court, relying heavily on *Wharton's Criminal Law and Procedure* and applying the *res gestae* rule, found that the conduct of the petitioners, and the other defendants, did indeed fall within the Tennessee felong-murder statute.

The petitions for habeas corpus to this court are far from lucid. But, considering that they were drawn by untutored laymen, I think it fair to infer that both petitioners are, among other things, complaining that they were generally denied due process by being convicted on the above set of facts. In their amended petition they make reference to the fact that this was one of the issues raised on appeal.

"One of the most controversial doctrines in the field of criminal law is the doctrine of felong-murder." 50 ALR 3d 399. At common law, a person who kills another in the commission of any felony was guilty of murder. Most states have statutes embodying this general common law principle, at least as to certain specified felonies. Under most of these statutes, the intent to kill is immaterial when a homicide is committed in the perpetration of the specified crimes. 40 AmJur 2d, Homicide, § 72.

Most of the authority for finding one guilty of a felony-murder where the murder is not actually committed while the accompanying felony is in progress, involves a situation where the murder is committed after the felony, such as during an escape. The *res gestate* doctrine is ordinarily applied to this situation. 58 ALR 3d 851. I am not able to find specific case authority for applying the felony-murder doctrine to facts precisely like the ones involved here. However, the general principles appear to reasonable encompass the present situation. At 40 AmJur 2d, Homicide, §73, this general proposition is stated:

> It is the general view that a homicide is committed in the perpetration or attempt to perpetrate another crime when the accused is engaged in any act required for the full execution of the initial crime, and the homicide is so closely connected with such other crime as to be within the *res gestae* thereof. The rule expressed by some courts is that a homicide is committed in the perpetration or attempted perpetration of a crime specified by the felony-murder

> statutes when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction. The *res gestae* of the underlying crime begins where an indictable attempt is reached and ends where the chain of events between the attempted crime or completed felony is broken. Application of the felony-murder doctrine does not require that the underlying crime shall have been technically completed at the time of the homicide, nor does it matter at what point during the commission of the underlying felony the homicide occurs. [Citations omitted.]

21 AmJur 2d, Criminal Law, §110 observes that an attempt has been defined "as any overt act done with the intent to commit the crime, and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime."

Mr. Pickens and Mr. Randolph entered into a scheme or conspiracy to commit the felony of robbery, and were in the process of carrying out that scheme when Mr. Douglas was shot and killed. They performed the intended robbery a few seconds after the shooting. In finding that the petitioners were guilty of a felony-murder under these circumstances, the Tennessee Supreme Court applied sound, well-established, legal principles. I do not think they went beyond the bounds of due process in doing so. The issue here is not whether we agree with the Tennessee Court of Appeals or the Tennessee Supreme Court, but whether the petitioners were denied their federally protected right to due process under the Fourteenth Amendment to the Constitution of the United States. Nor are we permitted to weight the evidence. Only where there is an entire lack of evidence to support a conviction may an attack be made by way of federal habeas corpus. *Phillips v. Pitchers,* 451 F.2d 913 (C.A. Cal. 1971); *Bailey v. Michigan,* 493 F.2d 1218, cert. den. 419 U.S. 858. There is ample evidence to have found Mr.

Pickens and Mr. Randolph guilty under the time-tested general rules relating to felony-murder.

Both Mr. Randolph and Mr. Pickens complained that their respective confessions were not voluntary. This issue was raised on behalf of both petitioners at the trial, and full hearings were held outside the presence of the jury. The state trial court found that the statements were voluntary and admitted them into evidence.

Mr. Randolph made two statements, one oral, which was taped and transcribed, and the other written. The oral statement was discontinued at one point and recommenced when another officer, who wanted to hear the statement, came into the room where it was being taken. There is, for this reason, some reference in the record to three statements of Mr. Randolph. The hearing concerning the voluntariness, or lack thereof, of Mr. Randolph's oral statement begins at page 569 of the trial transcript. Police officers of the Memphis Police Department testified in detail that Mr. Randolph was fully advised of his rights and that his statement was in no way coerced. They denied that there was any abuse practiced on him. Mr. Randolph testified outside the presence of the jury concerning the oral statement beginning at page 596 of the trial transcript. He testified that he was physically abused during his interrogation, being punched in the stomach by the interrogating officers. He also testified that he was not advised of his rights until after he had made the statement. Mr. Randolph's oral statement, in the form that it was read to the jury, begins at page 630 of the trial transcript.

Mr. Randolph's written statement was taken on the same day following his oral statement. He testified (beginning at page 661) that he was not advised of his rights until after he signed the statement, and that the statement was not voluntary. As noted above, the police officers testified that Mr. Randolph's entire interrogation was regular and only conducted after he was fully advised of his right to remain silent and his right to

counsel. Mr. Randolph's written statement, in the form it was submitted to the jury, begins at page 670 of the trial transcript.

The state courts found that Mr. Randolph's confessions were voluntary. This finding comes to this court with the presumption of correctness. 28 U.S.C. 2254. The matter was fully developed in the state trial court, where Mr. Randolph was given a complete hearing on the issue. Since we have a full transcript of that trial, I see no need for an additional evidentiary hearing in this court. From the transcript it appears that the state trial judge was fully justified in finding that Mr. Randolph's statements were voluntarily given, and that the Tennessee appellate courts were fully justified in accepting that finding. I therefore recommend that Mr. Randolph's claim that his confessions were involuntary be rejected on the state court record.

The voluntariness of Mr. Pickens's statement is a more difficult matter. He was arrested on July 18, 1970 at approximately 3:30 a.m. at his uncle's house in Memphis by uniformed officers of the Memphis Police Department. Later, around 5:30 a.m., he was interrogated by Detectives James R. Hester and G. E. Jordan, after which he allegedly gave an oral statement. Mr. Hester and Mr. Jordan testified (beginning at page 679 of the transcript) that Mr. Picken's oral statement was totally voluntary and given only after he was fully advised of his constitutional rights. They denied that he made any request for counsel. This oral statement, however, was not introduced into the trial, since a copy of it had apparently not been furnished to Mr. Pickens's attorney.

The hearing outside the presence of the jury concerning Mr. Pickens's written statement begins at page 689 of the transcript. Mr. Pickens was again interviewed on July 18, 1970, beginning around 8:25 a.m., by Detectives Robert M. Straton and J. C. Peel. They testified that he was fully advised of his rights to remain silent and to have a lawyer and that, in their opinion, he understood those rights. A statement was dictated to a typist, which was then signed by Mr. Pickens. The officers testified that

Mr. Pickens read the statement, but they acknowledged that it is standard police practice to take prisoners' glasses when they are arrested. They did not ask Pickens if he could read without his glasses. They denied that Mr. Pickens asked to call his attorney.

Mr. Pickens testified outside the presence of the jury, beginning at page 701. He testified that he was arrested about 1:30 a.m. on July 18, 1970 at his uncle's house on Democrat Road in Memphis. At the time he was arrested he was asleep in the bed when about eight uniformed officers of the Memphis Police Department came in and pointed guns at him. He testified that two of the uniformed policemen carried him up near some railroad tracks in a vacant field, put him out of the car and told him that they were going to shoot him. The police later stopped at a point near the river and again threatened him prior to arriving at the police station. At the police station Mr. Pickens's glasses were taken from him. He had suffered eye burns while he was working as a welder in 1964 and, as a result, was quite nearsighted. He testified that he was not able to read the alleged confession that he signed. Mr. Pickens testified that he was threatened with being beaten, and that the statement he signed was not his own.

On the evening before the morning Mr. Pickens was arrested he saw his picture in the Memphis afternoon newspaper together with a story stating that he was wanted in connection with this case. He testified that he called his lawyer, Mr. Anthony Sabella, who was at home at the time, and asked Mr. Sabella to accompany him to police headquarters. Mr. Sabella was otherwise engaged and told him to come to his office the next morning around 10:00 o'clock when he would accompany him to police headquarters. Mr. Pickens testified that, after he arrived at police headquarters, he asked to use the telephone to call his attorney but was denied that right. He said that the officers told him that a lawyer would do him no good.

Mr. Anthony Sabella took the stand and testified that he had represented Mr. Pickens in the past and that Mr. Pickens called him the day before he was arrested around 6:00 or 7:00 p.m. and told him that he had read an article in the paper saying that the police were looking for him. Mr. Sabella testified that he told Mr. Pickens to come into his office the next morning and he would surrender him to the authorities. He testified that he also informed him that, if he were arrested during the evening, he should just inform the police that he had an attorney and that he did not wish to be interrogated without his attorney present. The next morning, July 18, 1970, at around 10:30 a.m. Mr. Sabella was informed that Mr. Pickens was in custody at the police station. At police headquarters Pickens told Sabella that he had requested an attorney and informed the police that Mr. Sabella was his attorney, but was not permitted to call. Mr. Pickens also told Mr. Sabella that he was cold and wanted some member of his family to bring a heavy sweater.

There is a great deal of credibility to Mr. Pickens's account of his interrogation. The testimony concerning his calling Mr. Sabella the day before he was arrested is most believable. It seems highly unlikely that he would have gone to the trouble of calling Mr. Sabella and then not have mentioned to the police that Mr. Sabella was his attorney and that he wanted him when he was arrested. Also, the testimony concerning his inability to read without his glasses is quite believable. Although the state trial court did hold a fairly lengthy hearing on this matter, there are many other people who would likely know certain circumstances concerning Mr. Pickens's interrogation. For instance, none of the uniformed officers was called to testify, nor was the typist.

As to Mr. Pickens's claim that his confession was involuntary, I recommend that the court schedule and hold an evidentiary hearing in order to hear the full circumstances surrounding his interrogation and observe the demeanor of the witnesses involved.

The other principal issue litigated in the state court involved a violation of the rule set out in *Bruton v. United States*, 391 U.S. 123 (1968). Mr. Randolph and Mr. Pickens did not specifically raise this issue in their original *pro se* habeas corpus applications to this court. On February 23, 1976 the court entered an order requiring the petitioner Randolph to file a sworn amendment to his habeas petition stating "to what extent, if any, the grounds relied upon in his petition were litigated in the trial court and on appeal of his conviction." In response to that both Randolph and Pickens filed a joint amendment to their habeas petitions stating that they were not sure what grounds were raised in the state courts, since their attorneys would not communicate with them. They had, however, obtained a copy of the opinion of the Tennessee Court of Criminal Appeals. They noted in their amendment that the two principal issues litigated on appeal were whether the facts justified an application of the "felony-murder" rule and whether admiission of certain confessions constituted a violation of the rule in *Bruton*. As I noted previously, these are *pro se* petitions filed by men who are apparently not highly educated. I think it appropriate to infer from their original broad petitions and their amendment that they are seeking to raise those issues litigated in the state court, including the question of a violation of the *Bruton* rule. Since the issues has at least been arguably raised by the petitioners, I believe it would be the better practice for this court to address it at this time to avoid additional litigation.

Robert Wood initially gave an essentially exculpatory statement to the police wherein he simply stated that the poker game he was involved in was robbed by three unidentified black males. At the trial, however, he testified in his own defense and told a story which essentially fit that of the other witnesses and the confessions of Hamilton, Randolph and Pickens. He was, of course, fully subject to cross-examination by counsel for petitioners. Robert Wood's trial testimony begins at page 884 of the transcript.

Isaiah Hamilton made a confession, which is contained in the form it was presented to the jury at page 559 of the trial transcript. The petitioner Randolph made two statements, the latter of which was far more inculpatory than the first. They were both presented to the jury in an edited form. The first is contained at page 630 and the second at page 670. The petitioner Pickens gave two statements, but only one was submitted to the jury. It is contained at page 772 of the trial transcript.

The state trial court made an extensive and laborious attempt to edit the various confessions so as to avoid a violation of the *Bruton* rule. A reading of the confessions of Hamilton, Randolph and Pickens readily shows that that effort failed. The Tennessee Court of Criminal Appeals found that there was a violation of *Bruton* and indicated that they would have reversed for that reason alone were it not for the other errors. The Tennessee Supreme Court did not dispute that there was a violation of *Bruton* but found that this error was harmless in view of the similarity among the statements and the overwhelming evidence of guilt. The Supreme Court was also considering an appeal of Joe Wood, who made no confession of his own. As to him they found that the *Bruton* error was harmless because of overwhelming evidence.

In *Bruton v. United States,* 391 U.S. 123 (1968) Bruton and a co-defendant were convicted in a federal district court for armed postal robbery in a joint trial. Bruton's co-defendant did not testify, but his confession, implicating Bruton, was admitted into evidence, with the trial judge giving an instruction that the confession could only be used against the co-defendant and must be disregarded with respect to Bruton. The United States Supreme Court held that this procedure violated the Confrontation Clause of the Sixth Amendment to the Constitution of the United States. In reaching this conclusion the court overruled its prior decision on the subject in *Delli Paoli v. United States,* 352 U.S. 232.

In *Harrington v. California,* 395 U.S. 250 (1969), the Supreme Court held that a violation of the rules set out in *Bruton* was "harmless beyond a reasonable doubt" under the facts of the case. Harrington had been tried in a California state court with three co-defendants who had confessed and implicated Harrington. Harrington himself made a statement which, although not a confession, placed him at the scene of the crime. One of the confessing co-defendants took the stand and was subjected to cross-examination by Harrington's counsel. There was other evidence implicating Harrington, including several eye witnesses who placed him at the scene of the crime. The court reaffirmed its holding in *Chapman v. California,* 386 U.S. 18, to the effect that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Applying that test, the court in *Harrington* was not able to "impute reversible weight to the two confessions [of the non-testifying co-defendants]."

In *Schneble v. Florida,* 405 U.S. 427, Schneble and a co-defendant were jointly tried in a Florida state court for murder. At the trial neither took the stand and testified but confessions of each implicating both of them in the murder were admitted into evidence. Schneble's own confession was far more detailed and explicit than that of his co-defendant. The Supreme Court held that, under the circumstances of the case, the violation of *Bruton* committed by admitting the non-testifying co-defendant's statement was harmless beyond a reasonable doubt.

In the present case the confessions of Hamilton, Randolph and Pickens are essentially alike in the material details and are corroborative of one another. Robert Wood's initial confession did not identify the petitioners and Hamilton as the three men who robbed the poker game. His later testimony, however, did implicate them. Robert said that he knew Hamilton and "assumed" that Randolph and Pickens were the other two since he met them after the incident. Aside from the confessions of

the petitioners and Hamilton and the testimony of Robert Wood, there is no other evidence in the record identifying the petitioners and Hamilton as the three Negro males who assisted Joe Wood in the robbery of the poker game. Tommy Thomas was not able to identify them, and Joe Wood did not testify or confess.

It is difficult to ascertain to what extent a petitioner's own confession enters into the equation which produces "overwhelming evidence" to offset a *Bruton* violation. In the case of *Glinsey, et al. v. Parker*, 491 F2d 337, cert. den., 417 U.S. 921 (6th Cir. 1974), the petitioners, Glinsey, Franklin and Bailey, as well as three co-defendants, Hurd, Harris and Johnson, gave essentially identical statements to the effect that they all participated in an armed robbery on November 29, 1969. The statements of all six defendants confessing to the robbery and implicating the others were introduced at the state trial, with a cautionary instruction that the admissions could not be considered against any defendant other than the one who made the admission. Hurd, Harris and Johnson did not testify, and the petitioners, though testifying, all repudiated their confessions. After discussing *Harrington* and *Schneble*, above, in considerable detail, the court drew this conclusion:

> We have examined the trial transcript of the state proceedings against the appellants. Aside from the statements which were introduced, there is no evidence linking Glinsey or Bailey with the November 29 robbery. Franklin was positively identified by an employee of the liquor store as one of the holdup men. The same witness identified Hurd, but was unable to identify either of the other participants, though the statements of all agreed that Hurd and the three appellants took part in the robbery inside the store while the other two remained in the car. We find the error in the introduction of the Hurd and Harris statements to be harmless beyond a reasonable doubt insofar as it affected the trial of Franklin. His own confession in conjunction with the positive identification by a victim of the robbery constituted overwhelming evidence of guilt. *Schneble v. Florida, supra.* We find no such overwhelming evidence of guilt outside of the improperly admitted statements with respect to Glinsey and Bailey.

The district court was, therefore, directed to grant writs of habeas corpus for Glinsey and Bailey unless the state retried them within a reasonable period of time.

It appears, therefore, that a confession of a petitioner which is materially like the confession of a non-testifying co-defendant will not, by itself, furnish the "overwhelming evidence" to render a *Bruton* violation harmless, at least where there is a question concerning the voluntariness of the petitioner's own statement. In *Schneble*, above, the court pointed out that the jury must have found that Schneble's own statement was voluntarily given because, had they not so found, there was not sufficient additional evidence, including the statement of the co-defendant, to have convicted him.

In the present case counsel for petitioners cross-examined the officers who introduced the petitioners' statements concerning the voluntariness of those statements, and the court gave an instruction that a statement must be voluntary to be considered as competent evidence. (Page 942) We, of course, do not know what the jury did; but if the jury, for instance, found that Pickens's statement was coerced and that Hamilton and Randolph's statements were not, as they clearly could have found under the evidence and the charge, they may well have convicted Pickens solely on the inadmissible statements of Hamilton and Randolph. The only other evidence implicating him was the somewhat tentative identification of Robert Wood, and the jury could well have rejected his testimony in view of his prior inconsistent statement.

I would have no difficulty finding from the record that the *Bruton* violations were harmless by a preponderance of the

evidence. But the violation must be harmless beyond a reasonable doubt for a conviction to stand; which is as it should be to prevent trial courts from disregarding a sound rule based on important considerations of basic fairness. I cannot find from the trial record that the violations here were harmless beyond a reasonable doubt.

In view of the cursory, *pro se*, nature of the petitions and the seriousness of the *Bruton* question in this case, I would recommend that the court appoint counsel for petitioners with leave for them to amend the petition within a certain period of time and then permit the state to respond within an additional period of time.

Mr. Pickens claims that he was denied his federally protected constitutional rights by being indicted and convicted on perjured testimony of Robert Wood. As I noted above, Robert Wood initially gave a statement to police which largely exculpated himself but did not identify the petitioners and Hamilton. He testified differently at the trial. We do not know what prompted the grand jury to indict Mr. Pickens; but if it was Mr. Wood's testimony it must have been something similar to what he testified to at trial, since that is what implicated the petitioners. Mr. Wood was fully subjected to cross-examination by Pickens's lawyer, and his earlier, inconsistent, statement was presented to the jury. Although I do not feel that Mr. Wood's testimony would, of itself, furnish the overwhelming evidence to offset the *Bruton* violations, I do not see how the introduction of that evidence would have been a denial of due process.

Mr. Pickens's further claims that certain original records and tape recordings of interrogations were sold by a Memphis police officer to True Detective Magazine. He claims that this evidence would have proved his innocence and was not available during the trial. I can find nothing in the record indicating that any record of Pickens's interrogation were not available at the trial, and there is certainly no evidence in the record to show that a police officer sold records to True Detective Magazine. Therefore, this is an issue on which state remedies have not been exhausted. Even if records were improperly sold, I cannot see from the present record how that might have adversely affected Pickens's defense. As I noted above, Pickens gave two statements, one oral and the other written. The oral statement was not introduced at the trial, since a copy had not been furnished to Pickens's lawyer. The written statement was dictated to a police typist and signed by Pickens. That statement was introduced, along with considerable testimony concerning the way it was taken.

Pickens also claims that he was denied effective counsel in the state court proceedings. This is an issue concerning which state remedies have clearly not been exhausted.

James Randolph raises the same issues Mr. Pickens raised, which should, in my opinion, be disposed of in the same manner. Randolph's claim that records were unavailable has some more merit than Pickens's similar claim, but not enough to merit further consideration in this federal habeas case. Mr. Randolph gave two statements, one oral and the other written. The oral statement was transcribed from a tape, which was apparently not available at the trial. (Page 581.) Randolph's counsel did not, however, call for this tape, and the tape was not of any grave significance in view of the fact that the written statement was far more detailed and inculpatory than the oral statement taken from the tape.

I therefore recommend that the court appoint counsel for both petitioners and give counsel leave to amend the petitions to further develop the *Bruton* question and the issue of the voluntariness of Pickens's statement. The state should, I believe, then be given a period of time to respond to the amended petition on these issues, after which the court can either decide

the matter on the state court record or conduct an evidentiary hearing if one is needed.

Submitted this, the 17th day of September, 1976.

/s/ AARON BROWN, JR.,
U. S. Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

ORDER OF CONSOLIDATION AND APPOINTMENT OF COUNSEL

It appearing to the court that the three above-captioned matters have common issues to be ruled on and that it would be in the interest of all parties to consolidate them; it is so ORDERED.

It further appearing that it would be in the interest of all parties for petitioners to be represented by counsel; and since the record in C-76-69 (Pickens) reflects that Walter L. Evans, Esq. has made an appearance in that matter, the court believes that it would be proper to appoint Mr. Evans to represent the petitioners Randolph and Hamilton in their respective cases. It is so ORDERED.

The Clerk is directed to furnish Mr. Evans with a copy of the files in C-76-68 and C-76-310, and Mr. Evans is hereby granted 30 days in which to file any amendments to the *pro se* complaints which he deems necessary.

ENTER this 22nd day of September, 1976.

/s/ (Illegible)
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Isaiah Hamilton,
Petitioner,
vs. No. C-76-310

Chief H. L. Parker, Jailer,
Respondent.

(Title Omitted in Printing)

SECOND AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now your Petitioner, ISAIAH HAMILTON, by and through his appointed counsel of record and by Orders of this Honorable Court dated September 22, 1976 and October 26, 1976 and amends the original *pro se* Petitions for Writ of Habeas Corpus and states as follows:

I

Petitioner realleges and incorporates by reference all the allegations contained in his original *pro se* Petition for Writ of Habeas Corpus, with the exception that the filing of the original petition, he has been transferred to the State Penitentiary in Nashville, Tennessee and is now confined to the custody of the Warden of said State Penitentiary pursuant to the order of the Shelby County Criminal Court, Division I dated January 25, 1972.

That the petitioner along with four other co-defendants was found guilty of Murder in the Perpetration of a Robbery on January 25, 1972 by a Shelby County, Tennessee Criminal Court jury and sentenced to life imprisonment in the State Penitentiary.

III

Petitioner appealed his judgment of conviction to the Tennessee Court of Criminal Appeals at Jackson, which reversed the conviction. On certiorari, the Supreme Court of Tennessee reversed the Court of Criminal Appeals and reinstated the judgment of the trial Court.

IV

Petitioner is being illegally restrained of his liberty and seeks federal habeas corpus relief pursuant to 28 United States Code, Section 2254 on the following grounds:

a. The factual determination in the state court proceeding that the petitioner was guilty of Murder in the Perpetration of a Robbery is not fairly supported by the record, and thus constitutes a denial of petitioner's right to due process of law in violation of the Fourteenth Amendment of the United States Constitution.

b. That the admission into evidence in the state court of the coerced and involuntary confession of the petitioner was a violation of his Fifth, Sixth and Fourteenth Amendment rights under the Constitution because it was not freely, intelligently and voluntarily given and was obtained without first advising him of (1) his right to counsel before answering any questions; (2) his right to remain silent; (3) that any statement he gave could be used against him in Court; (4) that if he wished to remain silent or wanted an attorney at any time prior to or during questioning that all questioning would cease; and (5) that if he desired counsel and could not afford one, that an attorney would be appointed for him.

c. That the admissibility into evidence of the confessions of the co-defendants, James Randolph and Wilburn

Pickens, violated petitioner's Sixth Amendment rights under the United States Constitution and the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 LEd 2d 476 (1968), for the following reasons:

1. The confessions of the co-defendants implicated not only the confessing co-defendants but also petitioner.
2. The confessing co-defendants did not take the stand to testify at trial. Thus the introduction of their confessions added substantial weight to the government's case in a form not subject to cross-examination and confrontation of the witnesses against him, thereby violating Petitioner's Sixth Amendment rights and that this encroachment on his constitutional rights could not be avoided by a jury instruction to disregard the confessions as to Petitioner.
3. There was no other *credible* proof or evidence adduced at the trial, aside from the coerced confession of petitioner and the confessions of the co-defendants, which identified petitioner as one of the three Negro males who assisted Joe Wood in the robbery of the Poker game.

VI

All of the above grounds were raised and litigated in the state Courts and Petitioner has exhausted all of his post-conviction state remedies on said grounds.

PREMISES CONSIDERED, THE PETITTIONER PRAYS:

1. That a Writ of Habeas Corpus issue against the Warden of the State Penitentiary at Nashville, Tennessee requiring him to show cause if any, as to the legality of petitioner's restraint.

2. That the Petitioner have such other further and general relief to which he might be entitled.

ISAIAH HAMILTON
/s/ By: WALTER L. EVANS
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Wilburn Pickens,
Petitioner
v.
Chief Harry Parker,
Respondent
No. C-76-69

SECOND AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now your Petitioner, Wilburn Pickens, by and through his counsel of record and by Orders of this Honorable Court dated September 22, 1976 and October 26, 1976 and amends the *pro se* Petitions for Writ of Habeas Corpus and states as follows:

I

Petitioner realleges and incorporates by reference all the allegations contained in his original *pro se* Petition for Writ of Habeas Corpus, and the first Amendment to said Petition with the exception that he has since been transferred to the State Penitentiary in Nashville, Tennessee and is now confined to the

custody of the Warden of said State Penitentiary pursuant to the order of the Shelby County Criminal Court, Division I dated January 25, 1972.

II

That the petitioner along with four other co-defendants was found guilty of Murder in the Perpetration of a Robbery on January 25, 1972 by a Shelby County, Tennessee Criminal Court jury and sentenced to life imprisonment in the State Penitentiary.

III

Petitioner appealed his judgment of conviction to the Tennessee Court of Criminal Appeals at Jackson, which reversed the conviction. On certiorari, the Supreme Court of Tennessee reversed the Court of Criminal Appeals and reinstated the judgment of the trial Court.

IV

Petitioner is being illegally restrained of his liberty and seeks federal habeas corpus relief pursuant to 28 United States Code, Section 2254 on the following grounds:

a. The factual determination in the state court proceeding that the petitioner was guilty of Murder in the Perpetration of a Robbery is not fairly supported by the record, and thus constitutes a denial of petitioner's right to due process of law in violation of the Fourteenth Amendment of the United States Constitution.

b. That the admission into evidence in the state court of the coerced and involuntary confession of the petitioner was a violation of his Fifth, Sixth and Four-

teenth Amendment rights under the Constitution because it was not freely, intelligently and voluntarily given and was obtained without first advising him of (1) his right to counsel before answering any questions; (2) his right to remain silent; (3) that any statement he gave could be used against him in Court; (4) that if he wished to remain silent or wanted an attorney at any time prior to or during questioning that all questioning would cease; and (5) that if he desired counsel and could not afford one, that an attorney would be appointed for him.

c. That the admissibility into evidence of the confessions of the co-defendants, James Randolph and Isaiah Hamilton, violated petitioner's Sixth Amendment rights under the United States Constitution and the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) for the following reasons:

1. The confessions of the co-defendants implicated not only the confessing co-defendants but also petitioner.

2. The confessing co-defendants did not take the stand to testify at trial. Thus the introduction of their confessions added substantial weight to the government's case in a form not subject to cross-examination and confrontation of the witnesses against him, thereby violating Petitioner's Sixth Amendment rights and that this encroachment on his constitutional rights could not be avoided by a jury instruction to disregard the confessions as to Petitioner.

3. There was no other *credible* proof or evidence adduced at the trial, aside from the coerced confession of petitioner and the confessions of the co-defendants, which identified petitioner as one of the three Negro males who assisted Joe Wood in the robbery of the Poker game.

VI

All of the above grounds were raised and litigated in the state Courts and Petitioner has exhausted all of his post-conviction state remedies on said grounds

PREMISES CONSIDERED, THE PETITIONER PRAYS:

1. That a Writ of Habeas Corpus issue against the Warden of the State Penitentiary at Nashville, Tennessee requiring him to show cause, if any, as to the legality of petitioner's restraint.

2. That the Petitioner have such other further and general relief to which he might be entitled.

WILBURN PICKENS
/s/ By: WALTER L. EVANS
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

James Randolph,
Petitioner,
vs.
No. C-76-68
Chief Harry Parker,
Respondent.

(Title omitted in printing)

SECOND AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now your Petitioner, James Randolph, by and through his appointed counsel of record and by Orders of this Honorable Court dated September 22, 1976 and October 26, 1976 and amends the *pro se* Petitions for Writ of Habeas Corpus and states as follows:

I

Petitioner realleges and incorporates by reference all the allegations contained in his original *pro se* Petition for Writ of Habeas Corpus, and First Amendment to said Petition with the exception that he has since been transferred to the State Penitentiary in Nashville, Tennessee and is now confined to the custody of the Warden of said State Penitentiary pursuant to the order of the Shelby County Criminal Court, Division I dated January 25, 1972.

II

That the petitioner along with four other co-defendants was found guilty of Murder in the Perpetration of a Robbery on

January 25, 1972 by a Shelby County, Tennessee Criminal Court jury and sentenced to life imprisonment in the State Penitentiary.

III

Petitioner appealed his judgment of conviction to the Tennessee Court of Criminal Appeals at Jackson, which reversed the conviction. On certiorari, the Supreme Court of Tennessee reversed the Court of Criminal Appeals and reinstated the judgment of the trial Court.

IV

Petitioner is being illegally restrained of his liberty and seeks federal habeas corpus relief pursuant to 28 United States Code, Section 2254 on the following grounds:

a. The factual determination in the state court proceeding that the petitioner was guilty of Murder in the Perpetration of a Robbery is not fairly supported by the record, and thus constitutes a denial of petitioner's right to due process of law in violation of the Fourteenth Amendment of the United States Constitution.

b. That the admission into evidence in the state court of the coerced and involuntary confession of the petitioner was a violation of his Fifth, Sixth and Fourteenth Amendment rights under the Constitution because it was not freely, intelligently and voluntarily given and was obtained without first advising him of (1) his right to counsel before answering any questions; (2) his right to remain silent; (3) that any statement he gave could be used against him in Court; (4) that if he wished to remain silent or wanted an attorney at any time prior to or during questioning

that all questioning would cease; and (5) that if he desired counsel and could not afford one, that an attorney would be appointed for him.

c. That the admissibility into evidence of the confessions of the co-defendants, Wilburn Pickens and Isaiah Hamilton, violated petitioner's Sixth Amendment rights under the United States Constitution and the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) for the following reasons:

1. The confessions of the co-defendants implicated not only the confessing co-defendants but also petitioner.
2. The confessing co-defendants did not take the stand to testify at trial. Thus the introduction of their confessions added substantial weight to the government's case in a form not subject to cross-examination and confrontation of the witnesses against him, thereby violating Petitioner's Sixth Amendment rights and that this encroachment on his constitutional rights could not be avoided by a jury instruction to disregard the confessions as to Petitioner.
3. There was no other *credible* proof or evidence adduced at the trial, aside from the coerced confession of petitioner and the confessions of the co-defendants, which identified petitioner as one of the three Negro males who assisted Joe Wood in the robbery of the Poker game.

IV

All of the above grounds were raised and litigated in the state Courts and Petitioner has exhausted all of his post-conviction state remedies on said grounds.

PREMISES CONSIDERED, THE PETITIONER PRAYS:

1. That a Writ of Habeas Corpus issue against the Warden of the State Penitentiary at Nashville, Tennessee requiring him to show cause if any, as to the legality of petitioner's restraint.

2. That the Petitioner have such other further and general relief to which he might be entitled.

JAMES RANDOLPH
By: /s/ WALTER L. EVANS
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

(Title omitted in printing)

SECOND ORDER TO SHOW CAUSE

It appearing that on September 22, 1976 an order was entered consolidating these three matters for hearing and allowing amendments to petitions to be filed;

And it further appearing that on November 10, 1976 amended petitions were filed in all three cases;

It is ORDERED that respondent file an answer to the amended petitions, and, good cause appearing, respondent is allowed 23 days in which to file his answer.

ENTER this 21st day of December, 1976.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title Omitted in Printing)

SECOND ANSWER

Now comes the respondent by and through the Attorney General for the State of Tennessee, and in response to the second order to show cause in this matter would respectfully show unto this Honorable Court the following:

1. The response previously filed in the case of *Isaiah Hamilton v. Chief H. L. Parker*, No. C-76-310 is hereby adopted by reference. Likewise, the response previously filed in the cases of *Randolph and Pickens v. Parker*, Nos. C-76-68, C-76-69, is also adopted herein by reference. The State desires to continue to rely upon these responses and the other documentation and records previously filed with this Court in those matters prior to consolidation.

2. The respondent will herein make no further assertion with regard to the history of this case and the cases involving these petitioners which have preceded this one. The history of this case and the other relevant cases regarding these petitioners is amply shown by the record. Furthermore, the factual situation upon which the petitioners were convicted is accurately developed in the magistrate's report. The remainder of this response will be directed at the specific allegations which form the basis for the petitioners' application for federal habeas corpus relief.

3. **DENIAL OF DUE PROCESS**—All three petitioners here claim that they have been denied their rights to due process of law in violation of the Fourteenth Amendment of the United States Constitution. The basis for the petitioners' claim is an

allegation that the factual determination in the State Court proceeding is not fairly supported by the record. In reversing a decision by the Court of Criminal Appeals which was favorable to the petitioners, the Supreme Court of Tennessee dealt with this issue in *State v. Wood, et al.*, Opinion filed at Jackson, December 15, 1975, see record. Relying heavily upon *Wharton's Criminal Law and Procedure* the Court found that the defendants acted as co-conspirators and criminal liability attached to each of them. The fact that the actual murder occurred a few seconds prior to the entry of these petitioners is irrelevant. The important facts are whether a murder occurred and whether these petitioners were part of the overall illegal scheme which resulted in the eventual murder. These facts are indisputable as shown by the record. The report filed by the magistrate in this proceeding concludes that there is ample evidence to have found Mr. Pickens and Mr. Randolph guilty under the time tested general rules relating to felony-murder. Although that report did not specifically address the legal position of Mr. Hamilton, there could be no doubt from the record that the same conclusion would have been drawn with regard to him. Therefore, the respondent would state that this contention of the petitioners is without merit. The legal principles applied by the Supreme Court of Tennessee are sound and based upon ample evidence. In any event, the issue before this Court is whether the evidence is so lacking as to amount to a denial of due process. There can be no doubt that the relevant facts are supported by ample and sufficient evidence.

4. **THE VOLUNTARINESS OF THE CONFESSIONS BY RANDOLPH AND HAMILTON**—Both Mr. Hamilton and Mr. Randolph submit as their second basis for applying for habeas corpus relief that certain statements and confessions admitted against them in their trial were illegally obtained and should have been suppressed. The respondent has addressed these issues before in two separate responses, see *Hamilton v. Parker*, No. C-76-310, and *Randolph v. Parker*, No. C-76-68, and will con-

tinue to rely upon the response developed therein. In addition, the respondent would respectfully reference this Court to the magistrate's report where he concludes that the trial judge's determination that Mr. Randolph's statement was voluntarily given and the appellate court determination that the trial judge was correct are both justified by the record.

5. **VOLUNTARINESS OF PICKENS' CONFESSION**—Mr. Pickens also asserts as his second basis for applying for habeas corpus relief a claim that the State used against him an inculpatory statement which was illegally obtained. As noted by the magistrate's report on page 12, the State trial court held a lengthy hearing on this issue out of the presence of the jury. The State trial court then found that the confession or statement of Pickens was voluntarily given and that he had not been deprived his constitutional rights. In reversing the trial court judgment on other grounds, the Court of Criminal Appeals considered this assignment and found it without merit. See *Wood, et al. v. State*, Opinion filed at Jackson, June 5, 1974, see record. The Supreme Court of Tennessee reversed the Court of Criminal Appeals and in doing so impliedly agreed with the determination of voluntariness. The magistrate, however, has recommended that this Court schedule and hold an evidentiary hearing in order to hear the full circumstances surrounding the interrogation of Pickens and observe the demeanor of the witnesses involved. See Report at page 12. Apparently, the magistrate's conclusions are based upon two factors, (1) The fact that Pickens called his attorney the day before he was arrested, and (2) The fact that Pickens did not have his glasses and therefore did not know what he was signing. The respondent would respectfully state that the magistrate's conclusions are speculative and involve a reweighing and evaluation of the evidence which was before the State trial court. The respondent would assert that it is not the function of this court in a habeas corpus proceeding to reweigh evidence. The actual determination of the

State trial court comes to this Court with a presumption of correctness. The burden is hereupon the petitioner to establish that the fact finding procedure employed by the State courts was not adequate to afford a full and fair hearing or that he did not receive a full, fair and adequate hearing in the State courts. The burden is upon petitioner to establish by convincing evidence that the factual and legal determination by the State court was erroneous. Mr. Pickens has not carried this burden and therefore, the State court determination should prevail and his claim of involuntariness should fail.

6. **BRUTON VIOLATIONS**—All three petitioners rely for their third basis upon an alleged violation of their Sixth Amendment rights under the United States Constitution and the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968). The Supreme Court of Tennessee found that the three petitioners' situation was distinguishable from *Bruton* since in the instant case all three co-defendants confessed with similar, interwinding versions of their own actions. There was no contradiction or repudiation in the three confessions as was present in *Bruton*. Here, all three petitioners confessed, all three confessions were similar in factual content, and none of the petitioners testified. The Supreme Court concluded that the guilt of this trio was presented to the jury without any prejudice attaching under a *Bruton* analysis.

7. The magistrate's report states that the Tennessee Supreme Court did not dispute that there was a violation of *Bruton* but found that this error was harmless in view of the similarity among the statements and overwhelming evidence of guilt. The respondent would submit that the magistrate's report is not completely accurate in this respect. A more correct statement would be that the Tennessee Supreme Court distinguished the instant situation from that existing in *Bruton*. The magistrate correctly concludes that the confessions of Hamilton, Randolph and Pickens are essentially alike in the material details and are cor-

roborative of one another. However, the magistrate concludes that he cannot find from the trial record that the violations of *Bruton* were harmless beyond a reasonable doubt. Therefore, the magistrate finds that a serious question exists relative to the *Bruton* issue.

8. The respondent would respectfully assert that the magistrate's analysis of the instant *Bruton* questions is erroneous in two respects. First, the magistrate almost assumes a *Bruton* violation and treats the instant case as if it were factually similar to *Bruton*. Second, the magistrate after finding *Bruton* type violations then relies heavily uopn the case of *Glinsey, et al. v. Parker*, 491 F.2d 337 (6th Cir. 1974) in attempting to ascertain whether there is overwhelming evidence of guilt to offset the *Bruton* violations. The respondent contends that the instant petitions present a case which is factually distinguishable from both *Bruton* and *Glinsey*. Furthermore, it is the State's position that the distinctions are fatal to the instant application for habeas corpus relief.

9. In *Bruton*, two co-defendants Evans and Bruton were jointly tried for armed postal robbery. Evans did not testify but his oral confession which implicated both him and Bruton was admitted through the testimony of a postal inspector. Bruton did not confess. Therefore, *Bruton* is a case which involves a non-confessing defendant who is faced with a confessing but non-testifying co-defendant. In the instant case, none of the petitioners testified but all three confessed and all of their confessions were corroborative of each other.

10. *Glinsey* involved a case where six defendants were tried together. By the end of trial three of the defendants had pled guilty. None of the defendants who pled guilty testified. However, statements made by two of these defendants which implicated the three who had pled not guilty were admitted. The defendants who pled not guilty all testified and repudiated these

statements and their own confessions. The Sixth Circuit reversed as to two of the defendants since the statements of their non-testifying co-defendants were the only evidence against them. As to the third petitioner, the Sixth Circuit affirmed his conviction under the authority of *Schneble v. Florida*, 405 U.S. 427, 92 S. Ct. 1056, 31 L.Ed.2d 340 (1972). In doing so, the Sixth Circuit considered this individual's own confession, which had also been admitted, as part of the overwhelming evidence against him.

11. *Schneble* presents a fact situation more akin to the instant case. In *Schneble* two co-defendants we tried jointly for murder. Neither defendant testified but admissions made by each defendant implicating both of them were admitted. The Supreme Court of the United States affirmed the conviction of Schneble finding that the admission of his co-defendant's statement was harmless error in view of the overwhelming properly admitted evidence. The test applied by the Court in *Schneble* was whether the State's case was significantly less persuasive when the testimony as to the co-defendant's statement was excluded. It is extremely important to note that in reaching a finding of overwhelming guilt the Supreme Court considered the confession of Schneble against himself. Simply stated, although a confession may be inadmissible as to a co-defendant because of a *Bruton* violation, the same confession is admissible against the confessor and should be considered as part of the equation which produces overwhelming evidence to offset a *Bruton* violation. In other words, although Schneble's confession was inadmissible against his co-defendant it still must be considered against Schneble in determining whether the evidence is so overwhelming as to offset a possible *Bruton* violation. This rule particularly makes sense where in cases like *Schneble* and the instant case the confessions are consistent and corroborative. In cases such as these it can fairly be said that the co-defendant's confession was merely cumulative evidence.

In conclusion, it is the State's position that the petitioner's allegations with regard to *Bruton* violations should not prevail since the instant situation is distinguishable from *Bruton* because of the consistent, corroborative, and non-repudiated confessions of all three petitioners. Furthermore, it is the State's position that the rule of law found in *Schneble* should be applied by this Court if a *Bruton* violation is found. In that regard, this Court should find overwhelming evidence of guilt by considering the confession of each petitioner against himself in addition to the other evidence introduced against him. This is to say, that Hamilton's confession must be considered against Hamilton even though it may not be considered against Randolph and Pickens. The same is true for the confessions of Randolph and Pickens. When this method is utilized then there can be no doubt that overwhelming evidence of guilt was introduced and properly admitted against all petitioners.

WHEREFORE, for all the above stated reasons, the respondent prays that the application for a writ of habeas corpus be denied and this action be dismissed.

Respectfully submitted,

/s/ MICHAEL E. TERRY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

ORDER OF REFERENCE TO MAGISTRATE

IT APPEARING to the court that respondent has filed his response in each of these cases,

It is ORDERED that these cases now be referred to the Magistrate for study and review and a recommendation as to whether or not an evidentiary hearing is necessary, and if so, on what issues.

ENTER this 14th day of January, 1977.

/s/ (Illegible)
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

SUPPLEMENTAL REPORT ON REFERENCE

The cases of James Randolph and Wilbur Pickens were previously referred to me on their *pro se* application for habeas corpus relief. I filed a report on September 17, 1976 addressing the issues they raised in those petitions. The amended petitions

by counsel elaborate on those issues I considered in my prior report.

I have considered the amended petitions filed by counsel and the further responses filed by the State of Tennessee, and I am not persuaded to change my prior recommendation. I do not think the state courts violated the petitioners' rights to due process by convicting them of a felony murder under the facts of the case.

I am still not satisfied with the scope of the hearing in state court concerning the voluntariness of the confession of Wilbur Pickens, and recommend that this court hold an evidentiary hearing on that question.

The *Bruton* issue was, and remains, the most difficult issue in the cases. In its response filed January 13, 1977 the state appears to argue that the Tennessee Supreme Court did not, in fact, agree with the Tennessee Court of Criminal Appeals that there was a violation of the rule set out in *Bruton v. United States*, 391 U.S. 123 (1968). I believe that they did. The following is quoted from page 18 of the Supreme Court's opinion in this case:

> The facts of this case, when combined with the particular pattern of confessions and testimony by the various defendants, presents a hybrid *Bruton, Schneble, O'Neil* problem.
>
> The major criterion for the *Bruton* application is satisfied through the admissibility of confessions of the defendants, implicating their various co-defendants, without such co-defendants being afforded the opportunity of a cross-examination of their accusors.

Furthermore, from a reading of the redacted confessions in the record it is clear that there was, in fact, a violation of the *Bruton* rule. Therefore, the only question remaining is whether or not that violation was harmless beyond a reasonable doubt. I am still not able to find that it was.

The state places principal reliance on the case of *Schneble v. Florida*, 405 U.S. 427 (1972). I discussed that case in my prior report and pointed out that the Supreme Court observed that the jury must have found that Schneble's own statement was voluntarily given because, had they not so found, there was not sufficient additional evidence, including the statement of the co-defendant, to have convicted him. In the present case we cannot make any conclusive presumptions as to what the jury found. For instance, the jury might have found Pickens's statement to have been involuntary and Robert Wood's testimony to have been uncredible in view of his prior inconsistent statement and lack of definitive identification of Pickens. That would then have left only the illegally admitted statements of Hamilton and Randolph to furnish a basis to convict Pickens. The jury might reasonably have based its conviction of Pickens on the illegally admitted statements of Hamilton and Randolph, or either of them. A jury acting reasonably could have convicted any one of the petitioners solely upon one more of the statements of his non-testifying co-defendants which were illegally admitted in violation of the *Bruton* doctrine.

As I noted in my prior report, I could find from the record that the *Bruton* violations were harmless by a preponderance of the evidence, but I could not make that finding "beyond a reasonable doubt." I therefore believe that a writ of habeas corpus should issue as to Randolph and Pickens on the basis of the *Bruton* violation. I also believe that the court should hold a hearing on the voluntariness of Pickens's statement in order to make a complete record in this case.

PETITION OF ISAIAH HAMILTON

Isaiah Hamilton's case was not initially consolidated with that of Randolph and Pickens, so I did not render a formal report as to him. His case has now been consolidated with the others and his attorney has filed an amended petition raising the three

basic issues raised by Randolph and Pickens. As with the other cases, I would reject his petition to the extent that it asserts a violation of due process for Mr. Hamilton being convicted on the set of facts he was convicted on. With regard to this issue, he is in the same situation as Randolph and Pickens.

Mr. Hamilton also claims that his confession was coerced. He was arrested by Memphis police officers on an armed robbery charge, unrelated to the one we are presently dealing with, on July 16, 1970, around 4:55 in the afternoon. He was taken to police headquarters where he was interrogated. According to police testimony, he gave an oral statement around 9:20 p.m. and signed a written statement around 10:15 p.m. concerning the robbery and shooting of William Douglas. The officers testified that Mr. Hamilton was fully advised of his rights and that no coercion, threats or abuse was practiced on him. Mr. Hamilton testified outside the presence of the jury that he had only a third grade education and could not read and write. He testified that he did not make the statements attributed to him. The summary of his oral statement, in the form it was submitted to the jury, is contained at page 559 of the trial transcript. The state elected not to introduce Mr. Hamilton's written statement. Testimony concerning Mr. Hamilton's statement begins at page 446 of the trial transcript. Mr. Hamilton testified two times, beginning at pages 473 and 515.

The voluntariness of Mr. Hamilton's statement was exhaustively considered by the trial court, with that court finding that his statement was voluntarily given. This finding comes to this court with a presumption of correctness. 28 U.S.C. 2254. I can find nothing in the record to indicate that the presumption should not be indulged on this issue. I therefore recommend that the court accept the state court's finding that Mr. Hamilton's confession was voluntarily given. This, of course, does not mean that the jury found Mr. Hamilton's statement to have been voluntary—an issue that was submitted to them.

Isaiah Hamilton has substantially the same *Bruton* question available to him as Randolph and Pickens have. One slight difference, although I think not critical, between Hamilton's *Bruton* claim and that of Randolph and Pickens is that Robert Wood more definitively identified Hamilton in his testimony than he did Randolph and Pickens. He recognized Hamilton as being someone who had worked for his brother Joe. His identification of Randolph and Pickens was not that definitive. One might argue, therefore, that the harmlessness of the *Bruton* violation might be stronger in Hamilton's case. But, in view of the fact that Robert Wood had given an inconsistent statement and the possibility that the jury might have rejected his testimony for that reason, leads me to conclude that the *Bruton* violation as to Hamilton was likewise not harmless "beyond a reasonable doubt." I therefore feel that a writ of habeas corpus should issue for Hamilton as well.

Submitted this the 10th day of February, 1977.

/s/ AARON BROWN, JR.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

(Title omitted in printing)

ORDER DISMISSING CERTAIN CLAIMS AND ORDER GRANTING AND SETTING HEARING AS TO THE OTHER CLAIMS AND AUTHORIZING WRIT OF HABEAS CORPUS FOR PETITIONER PICKENS.

This cause is before the court on the amended petitions of all petitioners, responses of the respondent, technical record, transcript of evidence and appellate decisions relating to the

criminal trial of petitioners, report of the magistrate upon separate references, and upon the entire record in the cause.

This court concludes that the magistrate is correct in determining that all claims of petitioners other than the claim that the written statement of petitioner Pickens should not have been admitted in evidence and the claim of all petitioners that their *Bruton* rights were violated should be dismissed either on the ground that petitioners have not exhausted State remedies with respect to such claims or on the ground that the record makes it abundantly clear that the claims are without merit.

With respect to the claim of petitioner Pickens that his written statement should not have been admitted in evidence on the ground that it was not freely and voluntarily given and on the ground that his *Miranda* rights were violated in that connection, the court is of the opinion that an evidentiary hearing is necessary and therefore, the Clerk is authorized to issue a writ of habeas corpus to obtain the presence of petitioner Pickens here for consultation with his attorney at least four (4) days prior to the hearing, which is set for *FRIDAY, APRIL 29, 1977, at 11 a.m.*

With respect to the contention of all petitioners that their *Bruton* rights were iolated by the introduction in evidence of statements of other codefendants, the court is of the opinion that this issue can be resolved by consideration of the transcript and argument of counsel and that therefore an evidentiary hearing will not be necessary. This issue is set for argument of counsel on the same day, *FRIDAY, APRIL 29, 1977 at 11 a.m.* and the presence of petitioners Hamilton and Randolph will not be necessary.

It is so ORDERED.

ENTER this 23rd day of March, 1977.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

MEMORANDUM DECISION

Petitioners, Hamilton, Randolph and Pickens, were convicted in early 1972 in the Criminal Court of Shelby County of the offense of felony-murder, in this case a homicide in the perpetration of an armed robbery, and they received life sentences.

The state's factual theory, in a nutshell, can be stated as follows: In July, 1970, Robert Woods had lost a considerable amount of money in head-to-head card games with one Douglas and had become convinced that Douglas had been cheating him. In anticipation of still another game, Robert asked his brother, Joe Woods, to arrange to "have the game robbed," and in this way regain most, if not all, of what he had lost. Joe Woods then enlisted petitioner Hamilton, an employee of his, who associated petitioners Randolph and Pickens, to carry out this venture. While the card game was in progress, petitioners, by pre-arrangement, were waiting in the vicinity of the apartment where it was being held. Joe Woods and one Tommy Thomas were in the apartment watching the game. Joe left the apartment and brought petitioners back with him, but failed to gain entrance for them when Douglas, hearing strange noises in the hallway, refused to allow the door to be opened. However, later, after petitioners had returned to their place of waiting, Joe did obtain admission for himself into the apartment. Shortly thereafter, Joe pulled a pistol on Douglas and Thomas, and then, handing the pistol to Robert Woods, went to tell petitioners to move in on the game. (Obviously, matters were not going according to plan.) Before petitioners reached the apartment,

however, Douglas went for his pistol with the result that Robert Woods shot and killed him. Within seconds after the shooting, Joe and the petitioners knocked the apartment door down and entered, Robert then took all of the cash, and later petitioners Hamilton and Randolph (but not petitioner Pickens) were paid $50.00 for their participation.

The commission of a homicide during the commission of a felony was murder at common law, and under Tennessee criminal statutes (TCA § 39-2402) such is murder in the first degree.

The Tennessee Court of Criminal Appeals reversed the convictions, holding that, since the shooting of Douglas had occurred before petitioners had reached the scene, they could not be guilty of felony-murder. The Supreme Court of Tennessee, however, granted certiorari, reversed the Court of Criminal Appeals, and reinstated the convictions. It held that the shooting of Douglas was within the res gestae of the robbery in which petitioners were taking part.

Thereafter, petitioners filed the instant habeas petitions, which have been before the magistrate for a report and recommendation. With the exception of two of the claims raised by petitioners, the magistrate concluded, with which we have concurred, that the claims of petitioners have been foreclosed by the determinations made in the state courts or that petitioners have not exhausted state remedies with respect to such claims. In particular, the magistrate concluded (and we have agreed) that the application of the felony-murder rule under these facts did not constitute a denial of federal due process.

The issues that we have before us, then, are the following:

1. Was petitioner Pickens deprived of a *Miranda* right when his confession was taken after, he contends, he had asked that his lawyer be present.

2. Were all three petitioners denied their right to confrontation and cross-examination under the *Bruton* decision when their confessions were read to the jury and none of them testified.

I

With respect to petitioner Pickens' *Miranda* claim, it should be pointed out that his claim in this general area is actually broader than that he was denied access to counsel. Indeed, he claims that the arresting officers threatened him with physical harm on two occasions while he was being brought to the police station and that he was threatened with such harm again while there before he signed a statement. Pickens also claims that, because the police had taken his glasses, he could not read and did not know what he was signing and that the facts in the statement were supplied by the police. Thus Pickens claims that the signed statement was not a free and voluntary one and, indeed, that it was not his statement at all.

At the conclusion of the hearing on the admissibility of Pickens' confession, during which evidence had been introduced out of the presence of the jury on all of these matters, the state trial court overruled the motion to suppress on all grounds without elaborating. This court has concluded that, with respect to all of Pickens' contentions except that based on denial of access to counsel, the record supports the conclusion of the state trial court under the standards set out in 28 USCA § 2254(d) and that this court therefore cannot review such determinations. Our conclusion, however, is to the contrary with respect to the claim of denial of access to counsel.

The facts surrounding Pickens' contact with his lawyer on the day before his arrest were undisputed in the state trial court and are undisputed here. On the day prior to his arrest, Pickens' picture appeared in a local newspaper, along with others, with a story saying that they were wanted for the Douglas murder.

Pickens saw his picture and called a local lawyer, who already represented him in another matter, in the early evening and asked the lawyer to accompany him to the police station to turn himself in. The lawyer, Anthony Sabella, had already seen the picture and story. Sabella advised Pickens that he could not go with him that evening and asked Pickens to come to his office the next morning and he would surrender Pickens to the police. Sabella also told Pickens that if, in the meantime, he were arrested, he must advise the police that Sabella was his lawyer and that he wanted his lawyer present for any questioning. Pickens was arrested in the very early hours of the next morning.

Pickens testified in the state court and here that he told the police more than once that Sabella was his lawyer and wanted to contact him and that the police denied him the opportunity. The police testified in state court that Pickens never asked for a lawyer or mentioned Sabella.

It seems practically inconceivable to this court that Pickens, who had been in contact with his lawyer the evening before and had been instructed by his lawyer to tell the police that he wanted his lawyer present if he were arrested during the night, would not have mentioned this to the police, when they arrested him a few hours later and had him in custody. The police, it is true, testified that Pickens did not ask for or even mention that he had counsel, but the police were testifying about, to them, a routine event eighteen months after the event. We are satisfied, therefore, that this record does not support the finding that Pickens did not ask for access to his lawyer and on the contrary that the evidence is convincing that he did ask for access to his lawyer. 28 USCA § 2254(d).

We therefore conclude that the admission in evidence of Pickens' confession was constitutional error in that it violated his right as set out in *Miranda*.

II

As stated, each of the three petitioners contends that his right to confrontation and cross-examination, as such is set out in *Bruton*, was violated when the confessions of the other petitioners were admitted in evidence and neither of them took the stand and testified, although the trial court did charge the jury that each confession could be considered as evidence only against the defendant making the confession.

At the state trial, an effort was made so to redact the statements so that the identity of persons other than the declarant and persons not on trial could not be ascertained by the jury. This effort, however, was unsuccessful and respondent does not contend to the contrary.

The Supreme Court of Tennessee considered the *Bruton* problem and concluded that there was no constitutional error. Each of the confessions was consistent with the others so that they could be said to be interlocking confessions. It is not clear whether the Tennessee court considered that there was no such error because, under these circumstances, *Bruton* simply does not apply or because, under these circumstances, the violation of *Bruton* was harmless error.

In any case, respondent, relying on such cases as *Stanbridge v. Zelker*, 514 F.2d 45 (2nd Cir. 1975), holding that there was no *Bruton* violation because there were interlocking confessions, contends that the same result should be reached here so far as the *Bruton* issue is concerned. In *Glinsey v. Parker*, 491 F.2d 337 (6th Cir. 1974), however, our Court of Appeals held that *Bruton* applied where there were interlocking confessions. We therefore conclude that, as of now, the rule in this circuit is different from that in the Second Circuit.

Respondent alternatively contends that, even if *Bruton* applies and was violated, such was harmless error beyond a reasonable

doubt. This contention raises the question whether the confessions of petitioners Hamilton and Randolph, the admission of which this court has held not to have been constitutional error, could themselves be the basis of a finding that the *Bruton* violation was harmless. Again, in *Glinsey, supra,* at 343-344, our Court of Appeals seems to hold that the proper admission of a confession does not cure the *Bruton* problem as to the confessor. Moreover, other than the confessions of these petitioners, the only other evidence of their guilt is the testimony of Robert Woods whose identification of petitioners Randolph and Pickens was very weak. Still further, there was no proof, except in the confessions, that petitioners had been, though Joe Woods, a part of a pre-arranged robbery plan, a necessary ingredient to their conviction of felony-murder; Robert Woods supplied no such proof in his testimony.

Accordingly, we conclude that the right of these petitioners to confrontation and cross-examination was violated under *Bruton* and we cannot find that the violation of the *Bruton* principle was harmless error beyond a reasonable doubt.

ORDER FOR JUDGMENT

It is therefore ORDERED that the Clerk will enter a final judgment providing that petitioners will be discharged from custody unless (1) the State of Tennessee retries them within a reasonable time or (2) respondent timely appeals this decision in which case the discharge of petitioners will be stayed pending appeal.

ENTER this 2 day of May, 1977.

/s/ BAILEY BROWN
Chief Judge

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHIEF HARRY PARKER, Petitioner	*	
VS.	*	NO. 78-99
JAMES RANDOLPH, WILBURN LEE PICKENS and ISAIAH HAMILTON, Respondents	*	

MOTION OF RESPONDENTS, JAMES RANDOLPH AND WILBURN LEE PICKENS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the respondents, James Randolph and Wilburn Lee Pickens, by and through their court appointed counsel of record below, Walter L. Evans, and moves this Honorable Court for leave to proceed in forma pauperis and appoint Walter L. Evans as counsel to represent their interests in this proceeding and in support of said motion states as follows:

1. The respondents have been incarcerated in the State of Tennessee Penitentiary at Nashville for a considerable length of time pursuant to first degree murder convictions received in the State Court in Memphis in 1972.

2. The respondents originally filed their pro se petitions for Writs of Habeas Corpus in the United States District Court of Tennessee on pauper oaths stating that they were individually without money, securities or gainful employment and were unable to hire an attorney and pay for the costs of said proceedings.

3. That on October 5, 1976, Chief Judge Bailey Brown entered an order in the United States District Court consolidating the two companion cases and appointing Walter L. Evans of Memphis, to represent respondents on their original Petitions for Writs of Habeas Corpus.

4. That as a result of Walter L. Evans' representation of and argument on behalf of said respondents, the United States District Court ruled favorably on respondents applications for Writs of Habeas Corpus and ordered their release from custody unless the State (1) retried them within a reasonable time or (2) appeal the Court's decision in which case the discharge of respondents will be stayed pending appeal.

5. That the State of Tennessee appealed the decision of the United States District Court to the Sixth Circuit Court of Appeals in Cincinnati, Ohio.

6. That Walter L. Evans, in his continuing role as counsel for respondents, filed all the necessary documents and represented said respondents to the best of his ability at great personal expense, without any compensation or prospect for the same from said respondents, James Randolph and Wilburn Lee Pickens, for said representation on appeal.

7. That on March 3, 1978 an order was entered by the United States Court of Appeals for the Sixth Circuit formally appointing, Walter L. Evans, as counsel of record for the respondents, James Randolph and Wilburn Lee Pickens.

8. That as a result of the representation by Walter L. Evans of respondents, James Randolph and Wilburn Lee Pickens, the United States Court of Appeals for the Sixth Circuit on May 19, 1978 rendered an opinion affirming the decision of the United States District Court for the Western District of Tennessee.

9. The State of Tennessee has filed a Petition for a Writ of Certiorari in this Honorable Court to review the decision of the Court of Appeals for the Sixth Circuit.

10. That the financial conditions of petitioners, James Randolph and Wilburn Pickens, have not changed since they filed their original petitions for Writs of Habeas Corpus in the District Court and they have no funds or assets or prospects for securing the same to hire an attorney to represent their interests in this proceeding.

11. That Walter L. Evans is a private attorney and member of the Bar in good standing in the Supreme Court of the State of Tennessee (having been admitted on September 5, 1968); the Bar of the United States District Court for the Western District of Tennessee, Western Division (having been admitted on March 24, 1972); and the Bar of the United States Court of Appeals for the Sixth Circuit (having been admitted on February 9, 1978).

12. That Walter L. Evans, attorney, is very familiar with all the facts, law and circumstances involved in the State's Petition for Writ of Certiorari in this Honorable Court and can best represent the interests of the respondents James Randolph and Wilburn Lee Pickens in this matter.

For all of the above mentioned reasons, the movants respectfully pray that this Honorable Court will grant leave for them to proceed in forma pauperis and appoint Walter L. Evans, as attorney of record to represent their interests in this cause.

Respectfully submitted,

JAMES RANDOLPH

by: _____
Walter L. Evans, Attorney

WILBURN LEE PICKENS

by: _____
Walter L. Evans

A F F I D A V I T

STATE OF TENNESSEE
COUNTY OF SHELBY

I, the undersigned, after being duly sworn according to law doth hereby state that I was the court-appointed attorney for the respondents, James Randolph and Wilburn Lee Pickens in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit and that said petitioners are now incarcerated in the State Penitentiary in Nashville, Tennessee, more than two hundred miles from Memphis, affiants place of residence, and that I have personal knowledge of the inforamtion contained in the foregoing motion and the same is true to the best of my knowledge, information and belief.

Walter L. Evans
Walter L. Evans

Sworn to and subscribed before me on this 5th day of October , 1978 .

Verni Neven
Notary Public

My commission expires:

May 16, 1982

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion of James Randolph and Wilburn Lee Pickens has been forwarded to Mr. Michael E. Terry, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, attorney for petitioner and Mr. Alan B. Chambers, 147 Jefferson Avenue, Memphis, Tennessee, Attorney for Respondent, Isaiah Hamilton on this 5TH day of October , 1978.

Walter L. Evans
Walter L. Evans

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHIEF HARRY PARKER, Petitioner	*	
VS.	*	NO. 78-99
JAMES RANDOLPH, WILBURN LEE PICKENS and ISAIAH HAMILTON, Respondents	*	

RESPONSE AND BRIEF IN FORMA PAUPERIS OF RESPONDENTS JAMES RANDOLPH AND WILBURN LEE PICKENS, IN OPPOSITION TO THE STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Table of Authorities Cited.....	ii
Opinions Below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Summary of Argument.....	2
Statement of Case.....	2
Reasons for Denying the Writ.....	3
Argument.....	7
1. The Court of Appeals for the Sixth Circuit Correctly Interpreted the law as Enunciated by this court in Bruton v. United States and correctly applied it to the facts of this case....	7
2. The Federal District Court's and Sixth Circuit Court of Appeals' Determination That the Record in the State Court Proceeding, Does Not Fairly Support the Finding That Wilburn Pickens' Sixth Amendment Right to Counsel Was Not Violated Is Correct and Consistent with the Principles of Law Set Out in 28 U.S.C. §2254(d).....	14
Conclusion.....	21
Certificate of Service.....	21

TABLE OF AUTHORITIES CITED

	Pages
Brown v. United States, 411 U.S. 223 (1973).....	8
Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968).....	4, 7, 8, 13
Chapman v. California, 386 U.S. 18 (1966).....	9
Evans v. United States, 375 F. 2d 355 (8th Cir., 1967).....	7
Harrington v. California, 395 U.S. 250 (1969)....	4, 7, 8, 9
LaVallee v. Delle Rose, 410 U.S. 690 (1973).....	15, 16
Miranda v. State of Arizona, 384 U.S. 436 (1969).....	6, 20
Nelson v. O'Neil, 402 U.S. 622 (1971).....	8
Roberts v. Russell, 392 U.S. 293 (1968).....	8
Schneble v. Florida, 405 U.S. 516 (1969).....	4, 7, 8, 9
Townsend v. Sain, 372 U.S. 293 (1963).....	5, 14, 15, 16, 17, 18
Waddy v. Heer, 383 F. 2d 789 (6th Cir., 1967).....	14

FEDERAL STATUTES AND RULES

28 U.S.C.A., Section 2254(d).....	6, 14, 15, 16, 20
Federal Rules of Criminal Procedure, Rule 52(a).....	6, 14

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHIEF HARRY PARKER, Petitioner VS. JAMES RANDOLPH, WILBURN LEE PICKENS and ISAIAH HAMILTON, Respondents	NO. 78-99

RESPONSE AND BRIEF OF JAMES RANDOLPH AND WILBURN LEE PICKENS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

The Respondents, James Randolph and Wilburn Lee Pickens, respectfully pray unto this Honorable Court that the Petition for Writ of Certiorari filed by the State of Tennessee to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit on May 19, 1978, which affirmed the decision of the United States District Court, be denied so that the Writs of Habeas Corpus may promptly issue releasing them from prison or requring the State of Tennessee to retry them within a reasonable time.

OPINIONS BELOW

The relevant decisions and opinions involved in this proceeding have been included in and attached to the Appendix of the States' Petition and Brief and are referred thereto.

JURISDICTION

The respondents admit the jurisdiction of this Court to consider issuance of the Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit correctly applied the law as stated by this Court in Bruton v. United States, 391 U.S. 123 (1968) to the facts of this case when their similar confessions were read to the jury and none of them testified.

2. Whether the Court of Appeals was correct in affirming the factual determination of the District Court that the respondent Wilburn Pickens was denied his constitutional right to counsel as enunciated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966) when his confession was taken after he contends, that he asked that his lawyer be present.

ARGUMENT

1. The Court of Appeals for the Sixth Circuit correctly interpreted the law as enunciated by this Court in Bruton v. United States and correctly applied it to the facts of this case.

2. The Federal District Court's and Sixth Circuit Court of Appeals' Determination that the record in the State Court Proceeding does not fairly support the finding that Wilburn Pickens Sixth Amendment right to counsel was not violated is correct and consistent with the principles of law set out in 28 U.S.C. §2254(d).

STATEMENT OF THE CASE

The two questions presented to this Court for review are mixed questions of fact and law.

The summary of the facts upon which the decisions in this case are based are contained in the respective opinions of Tennessee Court of Criminal Appeals (Appendix D-A-40 of State's Brief), Supreme Court of Tennessee (Appendix C-A-20), United States District Court for the Western District of Tennessee (Appendix B-A-13) and the United States Court of Appeals for the Sixth Circuit. These opinions merely recite the state's theory of the case, much of which the respondents do not agree with but will accept for purpose of this response.

These respondents also will rely upon the statements appearing on pages 7-8 of the State's Petition and Brief as constituting a summary of the history of this case.

REASONS FOR DENYING THE WRIT

Three out of the four courts which have reviewed the convictions of the three respondents have found that their (the respondents) constitutional rights were violated at trial and that their convictions should be overturned. Despite the clear findings and decisions of the Tennessee Court of Criminal Appeals, the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit, the State of Tennessee has persisted in its determination to frustrate these decisions through the appellate process while the respondents continue to linger in the State Penitentiary at Nashville. Respondents deny that the State of Tennessee was surprised or "very much aggrieved by the decision of the Sixth Circuit." It is the respondents who are aggrieved by this petition and further efforts by the State to delay their inevitable release from custody and incarceration.

The decision of the Sixth Cirucit is in total agreement with the conclusions of fact and law stated by Chief District Court Judge in his memorandum decision.

These two decisions underscore and are consistent with the decision of the Tennessee Court of Appeals, which not only found a violation of the Bruton rule but also an insufficient amount of evidence to warrant a conviction for felony-murder.

In more than six and one-half years only the Supreme Court of Tennessee had agreed with the State's position in this matter and even it admitted (A-37) that the major criterion for Bruton was satisfied in this case. But, because of the allegedly intertwining confessions, the Court felt that the evidence was sufficient to support the convictions, which respondents deny. Were it not but for the misinterpretation of the facts and law by the Supreme Court of Tennessee, all three of the respondents would be free today.

The basic premises upon which the State is seeking certiorari relief are without merit. The Sixth Circuit was correct in its interpretation of Bruton v. United States, 391 U.S. 123 (1968) and, comparison with Schneble v. Florida, 405 U.S. 516 (1972) and Harrington v. California, 395 U.S. 296 (1969).

The State has erroneously analogized the crucial facts of this case to Schneble and Harrington rather than Bruton because it contends, among other things, that "there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant." (Petitioners Brief, p. 9). But, neither the District Court, nor Court of Appeals, in ruling on the Bruton issue, considered the prior confession and in-Court testimony of Robert Woods as having much impact on respondents convictions because of their gross inconsistency and Woods failure to positively identify respondents as being at the scene of

the shooting. Also, Robert Woods never met personally with either of the respondents prior to the incident to allegedly "plan" the robbery.

It is only in the confessions of Randolph, Pickens and Hamilton that place them at the scene of the shooting. Only the confessions of Pickens and Hamilton, however, make reference to any prior meeting with another person (Joe Woods) to "plan" the robbery.

A close examination of the confessions themselves do not disclose that Randolph and Pickens had "planned" very long before going with Hamilton to the scene of the poker game that night. Therefore, the confessions in this case, though similar in some respects, are inconsistent, illogical and secured under questionable circumstances. They do not interlock with the necessary quality for this Court to consider in resolving any possible conflict among the various circuits on the issue of "Interlocking Confessions."

The Bruton rule of exclusion was therefore properly applied to all police evidence concerning the confessions (written or oral) said to have been given by the three present petitioners, because neither one of them took the stand or was available for cross-examination by his co-defendants. There was also the absence of the other "overwhelming" evidence which existed in Harrington and Schneble.

Townsend v. Sain, 372 U.S. 293 (1963) and 28 U.S.C. §2254(d) provide the guideline and standards for conducting hearings on federal habeas corpus petitions. The Federal District Court adhered to these general requirements and concluded that the record in the State Court proceeding, considered as a whole, does not fairly support the factual determination that Pickens confession was admissable.

In considering the trial record and testimony of the witnesses (Pickens and his attorney) at the evidentiary hearing both the District Court and Sixth Circuit were convinced that he had been denied his right to counsel as stated under Miranda.

Both sides knew ahead of time that the evidentiary hearing would deal specifically with Pickens claim of denial of his right to counsel and the State elected not to call any witnesses and is now complaining about the Court's finding.

The trial court made no written finding, opinion otherwise in giving its reasons for ruling that Pickens' confession was admissible as to him. Therefore a presumption of correctness under 28 U.S.C. §2254(d), as contended by the State, does not exist. The District Court could therefore consider the trial record and evidence presented at the evidentiary hearing when the merits of a factual dispute are involved.

The Sixth Circuit affirmed the independent finding of fact and conclusions of law on this issue by the District Court, which had a rational basis and was not "clearly erroneous." See Federal Rules of Criminal Procedure, Rule 52(a).

There are therefore no special or important reasons for this Court to review this case and the writ of certiorari should not issue.

A R G U M E N T

I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY INTERPRETED THE LAW AS ENUNCIATED BY THIS COURT IN BRUTON V. UNITED STATES AND CORRECTLY APPLIED IT TO THE FACTS OF THIS CASE.

The decision of the Sixth Circuit in affirming the decision of the District Court, contains a well reasoned analysis of the case of Bruton v. United States, 391 U.S. 123 (1968) and applied it to the facts of this case. The Court left little doubt that it was convinced that the constitutional rights of the respondents were violated by the admission into evidence of their confessions without the opportunity for cross-examination. In deciding the Bruton issue the Court correctly compared and interpreted Harrington v. California, 395 U.S. 296 (1969) and Schneble v. Florida, 405 U.S. 516 (1973) and made it clear that those cases did not overrule Bruton but applied to certain specific facts not applicable to this case.

In Bruton there was a joint trial of Evans and Bruton for armed robbery of a post office. At the trial, a postal official testified that Evans orally confessed to him that Evans and Bruton committed the robbery. The Evans confession was later held inadmissible as being a violation of Miranda principles, and Evans' conviction was reversed. Evans v. U.S. 8th Cir., 1967, 275 F. 2d 355. Otherwise, the testimony against Bruton was weak (Evans, 375 F. 2d at Page 361). Evans was later re-tried and acquitted. At the joint trial, neither Bruton nor Evans testified, and the Trial Court gave the usual limiting instruction. This Court reversed Bruton's conviction, ruling that there was a "substantial risk" that the jury looked to the incriminating extrajudicial statements in

determining Bruton's guilt. and that the admission of Evans' confession in this joint trial violated Bruton's right of cross-examination secured by the Confrontation clause of the Sixth Amendment. This Court said at pages 127-128 of 391 U.S., page 1623 of 88 S. Ct:

> "Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight, to the Government's case in a form not subject to cross-examination, since Evans did not take the stand . . . (emphasis added)"

This Honorable Court has never gone beyond that holding. Nelson v. O'Neil, 402 U.S. 622, 628 (1971).

Bruton teaches that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." The holding of Bruton was reiterated in Roberts v. Russell, 392 U.S. 293 (1968).

Since Bruton and Roberts this Court has made it clear, however, that a Bruton error can be harmless. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 516 (1972); Brown v. United States, 411 U.S. 223, 231, (1973).

The state in its Petition for Writ of Certiorari has liberally cited and relied upon Harrington and Schneble to persuade this Court that the Bruton rule should not apply to this case. It has, however, erroneously compared the crucial facts of this case to Harrington and Schneble rather than Bruton. The racial makeup of the parties, though similar to those in Harrington and Schneble, does not constitute that similarity of facts which is important on the question of stare decisis.

Both Harrington and Schneble stand for the proposition that a violation of the Bruton rule in the course of a trial does not require reversal, if the evidence of guilt is "so overwhelming", that the prejudicial effect of the co-defendant's admission is so comparatively insignificant as to clearly be "harmless error". Schneble, 405 U.S., 1058-1960.

In Schneble both of the confessions of the two non-testifying defendants were consistent, corroborated by other evidence and there was a lack of contradiction in the record. In Harrington, there was other evidence implicating the defendant besides the confessions, including several eye witnesses who placed him at the scene of the crime. The Court in Harrington reaffirmed its holding in Chapman v. California, 386 U.S. 18 (1966) by saying that "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." (See Chapman, 386 U.S. 24). The Court further stated that "we do not depart from Chapman nor do we dilute it by reference." 395 U.S. at 254.

In Chapman the Court stated that:

> "In fashioning a harmless constitutional error rule, we must recognize that harmless error rules can work unfair and mischievous results when, for example, highly important and persuasive evidence or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 386 U.S. at 22.

In Harrington, this Court reminded us that the mere fact that an out of court confession is not incriminating of a co-defendant in express terms, does not mean that admission of the statement is harmless error. For the circumstances and the details of the confession may make it "as clear as pointing and shouting that the person referred to "was the co-defendant 395 U.S. at 253.

In the instant case, none of the confessing black co-defendants testified at trial or were present when the statements of the other was given. The only defendant to testify at trial was Robert Woods, a white co-defendant

who had also given a prior statement to the police, which was inconsistent with his testimony at trial (See Appellate Record 254-288). Chief District Court Judge Bailey Brown in ruling on the Bruton issue stated that:

> "...Other than the confessions of these petitioners, the only other evidence of their guilt is the testimony of Robert Woods whose identification of Petitioners Randolph and Pickens was very weak. Still further, there was no proof, except in the confessions, that petitioners had been (through) Joe Woods, a part of a prearranged robbery plan, a necessary ingredient to their conviction of felony-murder; Robert Woods supplied no such proof in his testimony."
> (Memorandum Decision A-13)

It is quite clear from a careful reading of the trial record (and the District Court and Sixth Circuit Court of Appeals so found) that the rights of the petitioners to confrontation and cross-examination were violated under Bruton and such violation was not "harmless error beyond a reasonable doubt."

The state seeks to establish the other "overwhelming" evidence in the record against the respondents by citing the testimony of some of the trial witnesses who said they saw "three colored men", "a white man and three blacks" and "three blacks" at the apartment door shortly after the shooting. (See State's Petition and Brief, Page 16). No witness, however, identified either of the three black respondents in Court as those "colored men" they saw at the scene. Joe Woods, who the confessions implicate as having met with the black co-defendants to plan the robbery, did not testify at trial nor make a written or oral statement to the police.

Without the confessions of the non-testifying co-defendants the government would not have been able to establish any involvement of respondents in the alleged criminal activity.

The confessions of Pickens, which is probably the more damaging of the three on the material issues, was found by both the Federal District Court and Court of Appeals to have been secured in violation of his constitutional rights. In addition, both Randolph and Pickens have consistently maintained that their statements were coerced, involuntary and not their own.

The Trial Judge instructed the jury that a statement must be voluntary to be considered as competent evidence. (State Record 942). It also instructed the jury after the reading of each confession to not consider the statements as they relate to any other defendant (Appellate Record 446-447). A careful reading of the record makes it difficult to determine what evidence the jury believed or even considered in convicting Randolph, Pickens and Hamilton of felony-murder besides their confessions.

The only statement of any pre-plans to rob the poker game is contained in the three similar statements of Randolph, Pickens and Hamilton. (See Appellate Record 445)

If only the confessions of Randolph and Pickens are considered separately and only as to the alleged confessor, then there was no evidence to corroborate any alleged meeting between Randolph, Pickens, Hamilton and Joe Woods. Robert Woods, the only one who testified, was not present at any such meeting. Joe Woods who allegedly met with the petitioners never testified, confessed or admitted any such meeting took place. But, because of the theory of the State at the trial, it was necessary to establish an alleged "agreement to rob the poker game" for there to be any reasonable chance of convicting petitioners on the other evidence they had. The confessions as in Bruton were therefore very vital to the government's case.

The State, in its brief, contends that the confessions themselves corroborate and are consistent with the State's theory of the case, and can constitute that "overwhelming evidence" talked about in Harrington and Schneble.

The confessions of Randolph, Pickens and Hamilton, though illogical and inconsistent in many respects, are essentially alike in the material details. That fact, however, should not, by itself, furnish that "overwhelming evidence" talked about in Harrington and Schneble to render a Bruton violation harmless, at least where there is a serious question concerning one of the defendants' (Pickens) statement.

The Sixth Circuit's decision addresses the issue of interlocking confessions in response to the State's contentions but does not say that these confessions interlock.

The interlocking confession theory adopted by some Circuits has been the result of efforts to determine the question of "harmless error" as applied to individual factual situations.

This theory in effect states that a Court may admit into evidence hearsay testimony depending upon the contents of said statement and how it compares favorably with other (normally) admissible evidence. Such a position disregards the basic principles of the Sixth Amendment to the United States Constitution and Bruton. Hearsay is Hearsay. It cannot be cured by saying that it is the same or similar to another statement. To reach this conclusion would be to say that because the confessions are "similar" in content and corroborate each other that they are admissable, even though neither co-defendant was present when the other gave his statement nor was able to cross-examine each other in Court.

This Court stated in Bruton that credibility and reliability of testimony and confessions of accomplices "is inevitably suspect" and this unreliability is "compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." Bruton at p. 136-138. It is clear, that these three respondents were victims of circumstance, innuendo, involuntary statements containing untrue information. The jury after having heard all the evidence and testimony probably could not distinguish one confession from the other. They could well have rejected Robert Woods' testimony in Court in light of his prior inconsistent statement and efforts to justify his theory of self defense.

The Federal District Court and Sixth Circuit Court of Appeals for many reasons, were correct in concluding that the rights of respondents to confrontation and cross-examination were violated under the Bruton rule and that the violation was not "harmless error beyond a reasonable doubt."

II

THE FEDERAL DISTRICT COURT'S AND SIXTH CIRCUIT COURT OF APPEALS DETERMINATION THAT THE RECORD IN THE STATE COURT PROCEEDING, DOES NOT FAIRLY SUPPORT THE FINDING THAT WILBURN PICKENS' SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED IS CORRECT AND CONSISTENT WITH THE PRINCIPLES OF LAW SET OUT IN 28 U.S.C §2254(d).

The Federal District Courts have jurisdiction to decide and rule upon an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State Court on the ground that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(d). In deciding the issue, the District Court may consider the whole record of the State Court proceeding and/or hold an evidentiary hearing when the merits of a factual dispute are involved. The District Court does not have to rely solely upon the State Transcript in making its determination. Townsend v. Sain, 372 U.S. 293 (1963); Waddy v. Heer, 383 F. 2d 789, (6th Cir., 1967), certiorari denied 392 U.S. 911, 88 S. Ct. 2069. It can make its own independent finding of fact and such a finding will not be set aside on appeal unless it is "clearly erroneous." Federal Rules of Criminal Procedure, Rule 52(a), Waddy v. Heer, 383 F. 2d 789 (6th Cir., 1967).

Townsend v. Sain was the precursor of U.S.C. §2254(d), and the U.S. Supreme Court in the case set forth the following general standards, among others, governing the holding of hearings on federal habeas corpus petitions.

> (a) When an application by a state prisoner to a federal Court for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew. 372 U.S. at 310-312.

> (b) Where the facts are in dispute the Federal District Court must grant an evidentiary hearing if"...(2) the state factual determination is not fairly supported by the record as a whole,...(5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full fair fact hearing..." 372 U.S. at 313

> (c) An evidentiary hearing may also be granted when the State Court applied an incorrect standard of constitutional law, or if for any other reason, the District Court is unable to reconstruct the relevant findings of the state trier of fact. 372 U.S. at 313-316

> (d) The Federal District Court must carefully scrutinize the State Court record in order to determine whether the factual determination of the State Court are fairly supported by the record. 372 U.S. at 316

28 U.S.C §2254(d) embodies substantially the same provisions as those standards set out in Townsend. It does not provide, as implied by the state, that a factual determination made by a state court, standing along, is entitled to a presumption of correctness in the District Court. (Petitioner's Brief, p. 23). Such presumption exists only when "...evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. §2254(d). In ruling on the voluntariness of Pickens' confession the trial court made no such written finding or opinion setting forth its reasoning or facts considered in concluding that Pickens' confession was voluntary. (p. 421, State Record).

Nowhere in the Court's ruling can it be determined whether Pickens' claim of denial of his constitutional right to counsel was considered. The Court very well could have merely ruled that the confession was not "coerced" in the traditional sense.

Supreme Court Justice Thurgood Marshall stated in his dissenting opinion in LaVallee v. Delle Rose, 410 U.S. 690, 93 S. Ct. 1203 (1973):

> "It is possible, of course, that the state court rejected all of [defendant's] testimony as incredible and therefore properly held the confession voluntary. On the other hand, if the state court had believed all of [defendant's] contentions, it would undoubtedly have found the confessions involuntary. There remains, however, the third possibility that the state court believed some of [defendant'] contentions and rejected others. It is the last possibility that makes for substantial uncertainty in a factually complex case such as this as to whether the state court correctly applied the abstract legal standard and did not, instead, commit constitutional error. 410 U.S. at 700

The facts surrounding Pickens' confession are more difficult and complex than those involved in LaVallee because of the specific instruction given to Pickens a few hours before his arrest by his attorney. Even if the Court was inclined not to give full credibility to Pickens account of his confession, it must consider the testimony of Pickens' attorney, Anthony Sabella, a member of the bar and an officer of the Court, and the reasonable inferences to be drawn from such instruction in light of Pickens statements in Court that he requested, among other things, to call his attorney before making any statements to the police.

The state relies to a great extent in its brief, and seems to imply that the case of LaVallee v. Delle Rose reversed the standards set forth in Townsend v. Sain, which it did not. The LaVallee court relied upon the language from Townsend in interpreting 28 U.S.C. §2254(d) (1). It did not hold that the District Court erred in holding de novo evidentiary hearing on the voluntariness of the defendants' confession. That is a question distinct from the presumption of validity and special burden of proof established by 28 U.S.C. §2254(d), which says nothing concerning when a district judge may hold an evidentiary hearing - as opposed to acting simply on the state court - in considering a habeas corpus petition. The question of whether such a hearing is appropriate on federal habeas corpus continues to be controlled by the Supreme Court's decision in Townsend v. Sain even after the enactment of §2254(d). See "Developments in the Law - Federal Habeas Corpus", 83 Harvard Law Review 1038, 1141 (1970).

Townsend explicitly recognized that, apart from the six specific instances described in that opinion as mandating an evidentiary hearing,

> "in all other cases where the material facts are in dispute, the holding of... a hearing is in the discetion of the district judge... In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318

The District Court agreed with the Magistrate's report on reference that an evidentiary hearing was necessary to consider anew the question of the voluntariness of Pickens confession because of certain undisputed testimony in the record which is not consistent with the trial court's determination that the confession was voluntary and admissible.

Chief Judge Bailey Brown in his order of March 23, 1977, in which he dismissed certain other claims of petitioners and granted the evidentiary hearing for Pickens stated as follows:

> "With respect to the claim of petitioner Pickens that his written statement should not have been admitted in evidence on the ground that it was not freely and voluntarily given and on the ground that his Miranda rights were violated in that connection, the Court is of the opinion that an evidentiary hearing is necessary and therefore, the Clerk is authorized to issue a writ of habeas corpus to obtain the presence of petitioner Pickens here for the consultation with his attorney at least four (4) days prior to the hearing, which is set for FRIDAY, APRIL 29, 1977 at 11 a.m." (Appellate Record 117).

Both sides therefore knew ahead of time that the evidentiary hearing would deal specifically with the issue of the voluntariness of Pickens confession and his request for counsel. The District Court wanted to "hear the full circumstances surrounding [Pickens'] interrogation and observe the demeanor of the witnesses involved" as recommended by the Magistrate's report. (Appellate Record 166).

It was obvious that the only witnesses the petitioner Pickens could expect to call to testify on his behalf at the evidentiary hearing was himself and Attorney Sabella, who represented him at the trial. This he did. On the other hand, the state refused to call any witnesses for the evidentiary hearing and elected to rely upon the testimony of the state witnesses in the trial court. (Appellate Record 80-82). Under Townsend v. Sain, either party may choose to rely solely upon the evidence contained in the state record (372 U.S., at 322), which the State did in this case.

The respondent had no obligation nor responsibility to call any of the state witnesses for the evidentiary hearing (as suggested in Petitioners' Brief, Page 22) where the state chose simply to rely on the state transcript. (Petitioners' Brief, p. 23).

The Court, therefore, had the opportunity to personally observe the demeanor and testimony of Pickens and Attorney Sabella and consider them in light of the state transcript. And based on the state's position, the Court had to assume that if the state witnesses were present, they would testify substantially the same as they did in the trial Court.

The testimony of Pickens and Sabella at the evidentiary hearing was substantially the same as at trial. And, the District Court inquired of them further into the basis for certain of their statements to resolve certain crucial questions surrounding Pickens request for counsel and his confession. The following facts were undisputed:

1. Sabella had represented Pickens a short time before his arrest on another charge.
2. On the day prior to his arrest, Pickens' picture appeared in a local newspaper along with others, with a story saying that he was wanted for the Douglas murder.
3. Pickens saw his picture and called his lawyer, Mr. Sabella, that same evening and asked him to accompany him (Pickens) to the police station to turn himself in.
4. Attorney Sabella had also seen the picture and story before Pickens called.
5. Sabella told Pickens that he could not go with him that evening and asked Pickens to come to his office the next morning and he would surrender him to the police.
6. Sabella also told Pickens that if, in the meantime, he were arrested, he must advise the police that Sabella was his lawyer and that he wanted his lawyer present for any questioning.
7. Pickens was arrested in the very early hours of the next morning and signed a confession before his attorney was contacted. (Appellate Record 18).

It was also undisputed that Pickens was nearsighted and could not read small print and did not have his glasses with him when he signed the written confession. (Appellate Record 373, 374, 362, 368, 38, 86-88).

Pickens testified in both the state court and at the evidentiary hearing that he told the police more than once that Sabella was his lawyer and wanted to contact him but the police denied him the opportunity. The police, on the other hand, testified in state court that Pickens never asked for a lawyer or mentioned his attorney, Sabella.

The Court had to resolve this factual dispute based on the whole record, not just the testimony of Pickens and Sabella at the evidentiary hearing and held as follows:

> "We are satisfied, therefore, that [the state court] record does not support the finding that Pickens did not ask for access to his lawyer and on the contrary that the evidence is convincing that he did ask for access to his lawyer. 28 U.S.C.A. §2254(d)
>
> We, therefore, conclude that the admission in evidence of Pickens' confession was a constitutional error in that it violated his right as set out in Miranda."
> (Memorandum Decision, A-17).

In arriving at its conclusion the District Court also considered the testimony of the police officers at trial and stated that they "...were testifying about, to them, a routine event eighteen months after the event." (A-17) The police's version of the facts regarding Pickens' interrogation was "practically inconceivable" and so unbelievable that the Chief District Judge could not find sufficient other evidence in the record to justify the trial Court's finding that Pickens' confession was voluntary.

Thus, the District Court found as a fact from the testimony heard at the evidentiary hearing and the review of the transcript of the state court proceeding, that Pickens requested his attorney prior to giving his confession and was denied such in violation of his Sixth Amendment Constitutional right to counsel as set forth in the case of Miranda v. State of Arizona, 384 U.S. 436 (1966). The finding of fact and conclusions of law on this issue were affirmed in total by the Court of Appeals for the Sixth Circuit.

CONCLUSION

For all of the above reasons the respondents, James Randolph and Wilburn Lee Pickens pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

Walter L. Evans
BROWN & EVANS
161 Jefferson Ave., Suite 1200
Memphis, Tennessee 38103
Court Appointed Attorney for Respondents
James Randolph and Wilburn Lee Pickens

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that two (2) true and exact copies of this Response of Respondents James Randolph and Wilburn Lee Pickens have been served on Michael E. Terry, Assistant Attorney General, State of Tennessee and Alan E. Chambers, Attorney for Appellee, Isaiah Hamilton by mailing the same addressed to their offices, postage prepaid on this 5TH day of October, 1978.

OCT 27 PAGE 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

CHIEF HARRY PARKER,

Petitioner,

Vs. No. 78-99

JAMES RANDOLPH, WILBURN LEE PICKENS,
AND ISAIH HAMILTON,

Respondents.

MOTION OF ISAIH HAMILTON FOR PERMISSION
TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Respondent, Isaih Hamilton, by and through his attorney of record, Alan Bryant Chambers, and moves this Court for permission to allow him to proceed in forma pauperis, and in support thereof would show unto the Court as follows:

(1) That he has been incarcerated in the Shelby County Jail and in the Tennessee State Penitentiary; that he has no money or funds whatsoever with which to finance an appeal.

(2) That Respondent Hamilton has been unable to pay his attorney any fee whatsoever for the appeal to the United States Supreme Court; but that counsel has taken this case probono publico.

(3) That Respondent Hamilton perfected his appeal to the Sixth Circuit Court of Appeals in forma pauperis.

(4) That Respondent Hamilton has meritorious issues to be resolved upon appeal; and that he is suffering greatly from imprisonment contrary to law.

WHEREFORE, Petitioner Hamilton prays for permission of the Court to proceed in forma pauperis.

Respectfully Submitted,

ALAN BRYANT CHAMBERS
Attorney for Isaih Hamilton
Suite 1000, 147 Jefferson Avenue
Memphis, Tennessee 38103
(901) 525-1732

CERTIFICATE OF SERVICE ON COUNSEL

I, Alan Bryant Chambers, do hereby certify that I have sent two copies of this Motion of Isaih Hamilton for Permission to Proceed in Forma Pauperis to Mr. Michael E. Terry, Assistant Attorney General, State of Tennessee and to Mr. Walter L. Evans, Attorney for Randolph and Pickens, on this the 11 day of October, 1978.

ALAN BRYANT CHAMBERS

OATH

I, Alan Bryant Chambers, Counsel for Isaih Hamilton, hereby certify that I have read the foregoing Motion and swear that its contents are true to the best of my knowledge, information, and belief.

ALAN BRYANT CHAMBERS

Sworn to and Subscribed before me on this the 11 day of October, 1978.

NOTARY PUBLIC

My Commission Expires:
My Commission Expires July 27, 1981

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

CHIEF HARRY PARKER,

Petitioner,

Vs. No. 78-99

JAMES RANDOLPH, WILBURN LEE PICKENS,
AND ISAIH HAMILTON,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI SUBMITTED IN FORMA PAUPERIS ON BEHALF OF RESPONDENT ISAIH HAMILTON

Respectfully Submitted,

Alan Bryant Chambers,
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147 Jefferson Avenue
Memphis, Tennessee 38103
(901) 525-1732

TABLE OF CONTENTS

Opinion & Orders Below. 1

Jurisdiction. 1

Questions Presented For Review. 1

Statement Of The Case. 2

Statement Of The Facts. 2

Brief & Argument: The United States Court Of. 3
Appeals For The Sixth Circuit Has Correctly Interpreted The Law As Stated by This Court in Bruton v. United States, Schneble v. Florida, and Harrington v. California

Brief & Argument: The Court Of Appeals Was. 6
Correct In Affirming The Factual Determination Of The District Court That The Respondent Wilburn Pickens Was Denied His Constitutional Right To Counsel

Conclusion. 7

Certificate Of Service. 8

TABLE OF AUTHORITIES

Bruton v. United States, 391 U.S. 123 (1968). 1, 3, 4, 5, 6, 7

Chapman v. California, 386 U.S. 18 (1967). 6, 7

Harrington v. California, 395 U.S. 250 (1969). 1, 3, 5

Miranda v. Arizona, 384 U.S. 436 (1966). 2,

Schneble v. Florida, 405 U.S. 427 (1972). 1

BRIEF AND OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

I
OPINION AND ORDERS BELOW

The opinions and orders below are accurately set forth in the appendix to Petition for Writ of Certiorari, and Respondent adopts them and will make reference thereto.

II
JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III
QUESTIONS PRESENTED

(1) Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in Bruton v. United States, 391 U.S. 123, (1968); Schneble v. Florida, 405 U.S. 427, (1972); and Harrington v. California, 395 U.S. 250 (1969).

(2) Whether the Court of Appeals was correct in affirming the factual determination of the District Court that the respondent Wilbur Pickens was denied his constitutional right to

counsel as enunciated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966), when his confession was taken after he had asked for his lawyer to be present.

IV
STATEMENT OF THE CASE

For statement of the case and introduction Respondent Hamilton would rely upon the submission by the State of Tennessee; and would show that the history of this law suit accurately appears on pages seven and eight of the Petition for Certiorari.

V
STATEMENT OF THE FACTS

Five men were arrested in this cause and charged with the offense of murder in the perpetration of a felony. Two of the men were white, Robert Wood and Joe Wood, brothers. Three of the men were black, Isaih Hamilton, James Randolph, and Wilburn Pickens. The trial was conducted in the Criminal Court of Shelby County, Tennessee.

At trial Defendant Robert Wood took the stand and admitted that he shot a gambler who he thought was cheating him; he also admitted that he thereafter took the money. State witness Tommy Thompson corroborated this version of the facts. Defendant Robert Wood did not testify that Isaih Hamilton, respondent herein, came to the game location as part of a pre-arranged plan.

The rest of the proof came by admission into evidence of statements of respondents Hamilton, Pickens, and Randolph. All three of these men challenged the admissability of the statement. Respondent Hamilton challenged the statement and asserted that it was inaccurate and did not contain substantially what he told the police.

Respondents Hamilton, Randolph and Pickens did not testify. The statements attributed to them incriminated one another. Therefore, they did not have an opportunity to confront and cross-examine one another on the content of the statements.

VI
BRIEF AND ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS CORRECTLY INTERPRETED THE LAW AS STATED BY THIS COURT IN BRUTON V. UNITED STATES, SCHNEBLE V. FLORIDA, AND HARRINGTON V. CALIFORNIA

Respondent Hamilton submits that this is a classic Bruton case. Five men are charged as Co-Defendants. Statements are attributed to four of the men, and admitted into evidence. Each statement inculpates the others. An attempt was made at redaction, but the statements were transparent as to who was referred to. The statements are admitted into evidence through the testimony of an investigating police officer. However, none of the four men take the stand to testify. Therefore, not one of the four can cross-examine or confront the Co-Defendants who made statements against them.

Respondent Hamilton has patiently considered the propositions of law urged by the State of Tennessee both before the District Court and the Sixth Circuit Court, and respectfully submits that they are totally without merit. The State of Tennessee would have this Court believe that Bruton does not apply where several Defendants give interlocking statements; but this notion is not supported by any language in Bruton.

The essence of Bruton is to enforce the Defendants Sixth Amendment Right to confrontation and cross-examination. In the case of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968), the Supreme Court stated as follows:

> "Before discussing this, we must pause to observe that in Pointer v. State of Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, we confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment, id., at 404, 85 S. Ct. at 1068; "a major reason underlying the constitutional confrontation rule is to cross-examine the witnesses against him." Id., at 406-407, 85 S. Ct. at 1069."
> (88 S. Ct. 1623)

In Bruton the Supreme Court detailed the factual basis of the Constitutional deprivation so that the application of the legal principles to a fact situation would be clear:

> "Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. The testimony was legitimate evidence against Evans, and to that extent was properly before the jury during its

> deliberations. Even greater, then, was the likelihood that the Jury would believe Evans made the statements and that they were true--not just the self-incriminating portions, but those implicating Petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."
> (88 S. Ct. 1620)

Respondent Hamilton would show that in this case the statements of Randolph and Pickens occupy the same logical Petition when used against him, as did Evans' statement in Bruton. Hamilton had no opportunity whatsoever to cross-examine Randolph or Pickens, because they did not testify. Therefore, the jury considered their statements, with transparent redactions, against him.

In its Petition for Certiorari the State of Tennessee places heavy reliance upon Harrington v. California, 395 U.S. 296 (1969). Harrington does not overrule Bruton. The Court made a finding of fact predicated upon the entire record in the Harrington case that no prejudicial error occurred. The Court should not make such a finding in this case because the State of Tennessee did not set out a complete factual situation upon which to base harmless error. Whereas, the District Court, with the Sixth Circuit Court affirming, found there was prejudicial error.

Prejudicial error was defined by this Court in the case of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), with the following language:

> ....Before a federal Constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."
> (386 U.S. 18)

It is preposterous to believe that the introduction and admissability of the statements was harmless beyond a reasonable doubt. If the confessions did not help the State of Tennessee in making out its case, it would not have introduced them in the first place. The jury must have been greatly persuaded by the statements. Since the jury were so persuaded by Bruton violation statements, then Mr. Hamilton was in fact prejudiced, and was denied a fair trial.

VII
BRIEF AND ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE FACTUAL DETERMINATION OF THE DISTRICT COURT THAT THE RESPONDENT WILBURN PICKENS WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL

Respondent Hamilton asserts that he was aggrieved and denied a fair trial by the admission of Pickens' statement because the statement was coerced. Respondent Hamilton submits that his case would have been relatively stronger had he not been burdened with the Pickens' statement. This statement and other error assigned in the primary appeal of his case

had an aggregate effect of denying him a fair trial. This argument more specifically refers to Wilburn Pickens; and Respondent Hamilton adopts the arguments set out by him in his response to the Petition for Certiorari.

VIII
CONCLUSION

Wherefore, for the reasons heretofore assigned, Respondent Hamilton submits that clear Bruton violations occurred when the statements of Randolph and Pickens were admitted into evidence against him. The admission of these statements was prejudicial error under Chapman v. California. The conclusion is that Respondent Hamilton's state trial was conducted contrary to the Sixth Amendment to the United States Constitution. Therefore, this Court should affirm the Sixth Circuit Court of Appeals decision that the State of Tennessee should be ordered to grant Hamilton a new trial or release him.

Respectfully Submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-99

CHIEF HARRY PARKER,
Petitioner,

vs.

JAMES RANDOLPH, WILBURN LEE PICKENS, and
ISAIAH HAMILTON,
Respondents.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Opinions Below	1
Grounds on Which Jurisdiction Is Invoked	2
Constitutional Provision Involved	2
Question Presented	3
Statement of the Case	3
Argument	8
Contrary to the Decision of the Sixth Circuit the Confrontation Clause of the Sixth Amendment and the Decisions of This Court Do Not Require the Writ of Habeas Corpus to Issue	8
Conclusion	25

Table of Authorities

Cases:

Barber v. Page, 390 U.S. 719 (1968) 10

Blumenthal v. United States, 332 U.S. 539 (1947) 11

Bruton v. United States, 391 U.S. 123 (1968) 3, 5, 6, 8, 11, 12, 16, 19, 22, 23

Bunton v. Commonwealth, 464 S.W.2d 810 (Ky. 1971) .. 20

Catanzaro v. Mancusi, 404 F.2d 296 (1968), cert. denied, 397 U.S. 942 (1970) 20, 21, 22, 23

California v. Green, 399 U.S. 149, 175 (1970) 9, 10

Connecticut v. Oliver, 273 Atl.2d 867 (1970) 20

Delli Poali v. United States, 352 U.S. 233 (1957) 11
Doddell v. United States, 221 U.S. 325, 330 (1911) 10
Dutton v. Evans, 400 U.S. 74, 94 (1970) 10

Ferguson v. Georgia, 365 U.S. 570 (1961) 9
Frazier v. Cupp, 394 U.S. 731 (1969) 24

Hall v. Wolff, 539 F.2d 1146 (8th Cir. 1976) 23
Harrington v. California, 395 U.S. 250 (1969) 3, 8, 12, 13, 14, 15, 16, 17, 18, 22, 23

Jones v. Florida, 227 So.2d 326 (Fla. App. 1969) 20

Krulewitch v. United States, 336 U.S. 440 (1949) 10

Lutwak v. United States, 336 U.S. 440 (1949) 25
Lutwak v. United States, 344 U.S. 604 (1953) 10

Mack v. Maggio, 538 F.2d 1229 (5th Cir. 1976) 23
Mancusi v. Stubbs, 408 U.S. 204 (1972) 10
Mattox v. United States, 146 U.S. 140, 151 (1892) 10
Mattox v. United States, 156 U.S. 237, 246-249 (1958) .. 10
McHenry v. United States, 420 F.2d 927 (10th Cir. 1970) 20
Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971) 22
Miranda v. Arizona, 384 U.S. 436 (1966) 7
Motes v. United States, 178 U.S. 458 (1899) 12

Oneil v. State, 455 S.W.2d 597 (Tenn. 1970) 20
Ortez v. Fritz, 476 F.2d 37 (2nd Cir. 1973) 20

People v. Moll, 256 N.E.2d 185 (N.Y. 1970) cert. denied, 90 S. Ct. 1707 (1970) 20
People v. Rayes, 266 N.E.2d 539 (Ill. App. 1970) 20
People v. Rosochacki, 244 N.E.2d 136 (Ill. 1969) 20
Pointer v. Texas, 380 U.S. 400 (1965) 11

Randolph, et al. v. Parker, 575 F.2d 1178 (6th Cir. 1978) 1, 19, 20
Roberts v. Russell, 392 U.S. 293 (1968) 12

Schneble v. Florida, 405 U.S. 427 (1972) 3, 8, 14, 15, 16, 17, 18
Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) 25
State v. Anderson, 229 So.2d 329 (1969), rev'd on other grounds, 403 U.S. 949 20
State v. Brinson, 177 S.E.2d 393 (N.C. 1970) 20
State v. Hall, 178 N.W.2d 268 (Neb. 1970) 20
Stewart v. Arkansas, 519 S.W.2d 733 (1975) 20

United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2nd Cir. 1971) 21
United States ex rel. Dukes v. Wallack, 414 F.2d 246 (2nd Cir. 1969) 20
United States, ex rel. Long v. Pate, 418 F.2d 1028 (7th Cir. 1969) 22
United States v. Digilio, 538 F.2d 972 (3rd Cir. 1976) .. 23
United States v. Spinks, 470 F.2d 64 (7th Cir. 1972), cert. denied, 409 U.S. 1011 (1972) 22
United States v. Venere, 416 F.2d 144 (5th Cir. 1969) .. 20
United States v. Walton, 538 F.2d 1348 (8th Cir. 1976) .. 23

West v. Louisiana, 194 U.S. 258, 265, 266 (1904) 10

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(d) 7

Misc.:

H. Steven, "The Trial of Sir Walter Raleigh", Transactions of the Royal Historical Society, 172, 184, (4th Series, Vol. II, 1919) 9

Note 44, St. John's Law Review 54, 64 (1969) 10

Sixth Amendment to the Constitution of the United States 2

5 Wigmore, Evidence § 1397 at 130-131 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-99

CHIEF HARRY PARKER,
Petitioner,

vs.

JAMES RANDOLPH, WILBURN LEE PICKENS, and
ISAIAH HAMILTON,
Respondents.

BRIEF FOR PETITIONER

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978, and is reported as *Randolph, et al. v. Parker*, 575 F. 2d 1178 (6th Cir. 1978).

This case arose as separate petitions for federal habeas corpus relief which were consolidated in the United States District Court for the Western District of Tennessee, Western Division. At the district level, these cases were styled *James Randolph v. Chief Harry Parker*, Civil C-76-68; *Wilburn Pickens v. Chief Harry Parker*, Civil C-76-69; and *Isaiah Hamilton v. Chief*

Harry Parker, Civil C-76-310. On May 2, 1977 Chief Judge Bailey Brown entered a Memorandum Decision which is not reported but is contained within the appendix at pages 321-326.

The opinion of the Supreme Court of Tennessee, reversing the Tennessee Court of Criminal Appeals, and affirming the convictions of the respondents, was filed on December 15, 1975 and is contained within the appendix at pages 227-246. The opinion of the Tennessee Court of Criminal Appeals, reversing the convictions of the respondents, was filed on June 5, 1974 and is contained within the appendix at pages 215-226. Neither of these opinions is reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978. The state did not file a petition to rehear. A petition for the writ of certiorari was timely filed with this Court and granted on November 27, 1978. The writ of certiorari was limited to question one presented by the petition. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit has correctly interpeted the law as stated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Harrington v. California*, 395 U.S. 250 (1969).

STATEMENT OF THIS CASE

The question before this Court may be characterized as a question of law. However, this question must also be decided with reference to the facts in this particular case. Therefore, the following summary of the facts is submitted so that this Court may be well acquainted with the factual basis upon which the three respondents were convicted in state court. Other summaries of the facts appear in the opinion of the Court of Criminal Appeals (Appendix pp. 216-218), the opinion of the Supreme Court of Tennessee (Appendix pp. 228-234), the magistrate's preliminary report (Appendix pp. 280-282), the district court's memorandum decision (Appendix pp. 321-322), and the memorandum decision of the United States Court of Appeals for the Sixth Circuit which is reported at 575 F.2d 1178 (6th Cir. 1978).

The three respondents were convicted for their participation in the murder and robbery of William Douglas, in Memphis, on July 6, 1970. Mr. Douglas was a professional gambler who had, for some time prior to his murder, been winning money from Robert Wood, one of the respondents' co-defendants in state court. Mr. Douglas, by using marked playing cards, had cheated

Robert Wood out of approximately $5,000 in three poker games set up between the two, spanning the three weeks prior to the Douglas murder.

Robert Wood suspected that he was being cheated and enlisted his brother, Joe Wood, also a co-defendant at the trial, in a scheme to recoup his losses. The scheme was for Robert to set up a game with Douglas, and for his brother and the three respondents to rob the game, and thus recoup some of Robert's losses. Prior to the night of the murder, Joe took two of the respondents, Hamilton and Pickens, to the scene of the game, pointed out to them the particular apartment where the game would be played, promised them $3,000 to $4,000 to rob the game, and also told them that he would be inside the game and would kill Douglas, if he had to. James Randolph was enlisted by Joe Wood to participate in the scheme on the night of the murder, July 6, 1970.

On that night, Robert Wood and William Douglas began playing poker at approximately 7:30 p.m. Joe Wood and one Tommy Thomas sat in the same room as spectators. Sometime before 9:00 p.m., Joe Wood announced he was going to get some beer. While allegedly obtaining beer, Joe Wood met with the three respondents. After a brief meeting, a trip to a nearby restaurant, the purchase of some beer, and the positioning of their automobiles, the four men approached the apartment. Those inside heard people approaching and Douglas, fearing a break-in, armed himself with a shotgun. Joe Wood convinced Douglas he was alone, and his three companions returned to their automobiles. Douglas made Joe Wood crawl through a small window next to the door. Once Joe Wood was back in the room, Douglas resumed the poker game. The game was resumed for some five to ten minutes when Joe Wood arose and asked permission to go to the bathroom. He came out of the bathroom armed with a gun and walked behind Douglas, ordering Douglas and Thomas to lie on the floor.

Joe Wood then handed the gun to his brother Robert, and ran out the door, leaving it open. Thomas, in an effort to avoid the shooting, arose from the floor, closed the door and attempted to talk to Robert Wood. Douglas then made a move for the pistol in his belt and Robert Wood killed him. Within seconds, the three respondents kicked in the door and one of the three fired a shot at Robert Wood. The record shows that Joe Wood had summoned them when he ran from the apartment. One of the respondents searched Thomas and took from him a knife and $80.00. Robert Wood took all the money on the table and stuffed it in his pockets. Everyone then left with the exception of Thomas, who remained behind with Douglas. The three respondents and the two Wood brothers, riding in two automobiles, went to the apartment of Hamilton where they hid the weapons and split the money.[1]

Subsequent to this incident all five co-defendants were either arrested or surrendered themselves to the Memphis police. Statements were made by all defendants except Joe Wood. At trial, only Robert Wood testified. The statements of Hamilton, Pickens, Randolph, and Robert Wood, all found by the trial judge to have been given freely and voluntarily, were admitted into evidence through the testimony of several police officers of the Memphis Police Department. In an effort to comply with *Bruton*,[2] the trial court and all counsel diligently attempted a program of redaction and deletion for each of these statements.

---

[1] The statement of the case in the Petition for Writ of Certiorari contained a somewhat different interpretation of the facts. In the petition, the conclusion reached is that Pickens did not go to Hamilton's apartment after the crime, nor did he receive any money. A closer examination of the trial records makes this interpretation erroneous. Only Pickens' own self-serving statements would support this conclusion. The statements of his co-defendants, including the testifying Robert Wood, support the conclusion that Pickens went to Hamilton's apartment and did receive his share of the money. (*See* Appendix, pp. 136, 143).

[2] 391 U.S. 123 (1968).

The original signed statements and a police record of an oral statement made by Hamilton were made part of the trial record but not viewed by the jury. Substantial and material other evidence was admitted showing the guilt of each of the defendants. This other evidence is more fully described and discussed within the argument portion of this brief.

On July 25, 1972, the two Wood brothers and the three respondents were found guilty of murder in the perpetration of a robbery in the Criminal Court of Shelby County (Memphis), Tennessee. Punishment for each was set at life in the state penitentiary. These convictions were appealed to the Court of Criminal Appeals of Tennessee and, on June 5, 1974, the Court of Criminal Appeals rendered a divided decision reversing the convictions of all five defendants. (Appendix, p. 215). Although the Court of Criminal Appeals found *Bruton* type error, the decision is primarily based upon an interpretation of the felony murder rule. The state petitioned the Supreme Court of Tennessee and certiorari was granted. On December 15, 1975, the Supreme Court of Tennessee rendered a per curiam opinion reversing the Court of Criminal Appeals and affirming the convictions. (Appendix, p. 227).

In February of 1976 Wilbur Pickens and James Randolph sought resort to the federal courts by filing petitions for the writ of habeas corpus. (Appendix, p. 247). On March 17, 1976 the State responded to the cases of Pickens and Randolph. (Appendix, p. 259). Subsequently, Isaiah Hamilton petitioned for the writ of habeas corpus and his case was consolidated with that of the other two respondents. (Appendix, pp. 264, 296). The cases were referred to a magistrate for report. (Appendix, p. 264). After several responses by the State and several references to the magistrate, an evidentiary hearing was set by Chief Judge Brown and held in Memphis on April 29, 1977. Although argument was held on the *Bruton* issue the primary thrust of the evidentiary portion of this hearing concerned an

alleged *Miranda*[3] violation which only related to Pickens. On May 2, 1977 Chief Judge Brown rendered a memorandum decision concluding that the admission into evidence of Pickens' confession was constitutional error in that it violated his rights as set out in the *Miranda* case. Judge Brown also found that the rights of all three petitioners, pursuant to the *Bruton* doctrine, were violated and that he was unable to conclude that this violation was harmless error. (Appendix, p. 321). A judgment was entered in accordance with the memorandum decision and the State was ordered to discharge the petitioners from custody unless they were retried within a reasonable time, or a timely appeal was taken.

The State of Tennessee timely appealed the case to the United States Court of Appeals for the Sixth Circuit, sitting in Cincinnati, Ohio. On May 19, 1978 the Court of Appeals rendered a decision affirming the district court. No petition to rehear was filed since the decision of the Court of Appeals addressed all issues in question. The State of Tennessee then sought a writ of certiorari from this Court presenting two questions, the one here briefed and a second question concerning the district court's re-weighing of evidence on the *Miranda* issue as it related to 28 U.S.C. § 2254(d). On November 27, 1978 this Court issued the writ of certiorari limited to question one, which is here briefed.

---

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT

Contrary to the Decision of the Sixth Circuit the Confrontation Clause of the Sixth Amendment and the Decisions of This Court Do Not Require the Writ of Habeas Corpus to Issue.

The United States Court of Appeals for the Sixth Circuit has voided three first degree murder convictions, obtained almost seven years ago. The State of Tennessee is very much aggrieved by the decision of the Sixth Circuit and submits this decision is based on a misinterpretation of certain decisions of this Court and is inconsistent with decisions rendered in other circuits and various state courts.

The Sixth Circuit's decision is based primarily upon a finding that the respondents' constitutional rights, as enunciated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner has maintained throughout the federal proceedings that the doctrine of *Bruton* is inappropriately applied to this case. The case sub judice is much more analogous to the factual situations before this Court in *Schneble v. Florida*, 405 U.S. 427 (1972), and *Harrington v. California*, 395 U.S. 296 (1969). The case before this Court should not be labeled a *Bruton* case. The case before this Court is a right to confrontation case, if it must be labeled at all. The decision of the Sixth Circuit results from a misinterpretation of this Court's decisions in *Bruton*, *Schneble*, and *Harrington*; and the prevailing law regarding the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment guarantees the right to confrontation for the beneficiaries of the American Constitution. The Clause itself is immutable and, of course, is an Eighteenth Century articulation of the right. The right, however, is evolutionary in nature. This characteristic has caused some confusion among men searching for the origin of

the Clause. This characteristic also causes confusion when men search for the meaning of the right.[4]

As to the origin of the Clause, one popular notion is the Clause is an indirect result of the trial of Sir Walter Raleigh in 1603 which focused attention on certain abusive trial practices. Sir Walter's conviction for treason to a great extent rested upon a statement made by one Cobham, who implicated Raleigh in a plot to seize the throne. Sir Walter, according to the story, had a retraction and attempted to call Cobham as his witness but failed.[5]

Professor Wigmore explains the Confrontation Clause as a constitutionalization of the hearsay rule and all its exceptions.[6] Perhaps a better view is that the Clause originated simply as part of the overall effort of the Framers to constitutionally assure that a fair defense could be made to criminal accusation.[7] Mr. Justice Harlan, after examining the original of the Clause

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[4] The interpretative extremes to which the Clause is susceptible was most succinctly stated by Mr. Justice Harlan in *California v. Green*, 399 U.S. 149, 175 (1970): "Simply as a matter of English the Clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial. Since, however, an extrajudicial declarant is no less a witness, the Clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony".

[5] *See California v. Green*, 399 U.S. 149, 158, 177-179 (1970) (Harlan, J., concurring), citing F. Heller, *The Sixth Amendment*, 104 (1951) and H. Steven, "The Trial of Sir Walter Raleigh", *Transactions of the Royal Historical Society*, 172, 184, (4th Series, Vol. II, 1919).

[6] *See California v. Green, supra* at 399 U.S. 178 at 179, citing 5 Wigmore, *Evidence* § 1397 at 130-131.

[7] Sir Walter Raleigh's inability to call or cross-examine Cobham was not the only problem he experienced in attempting to defend himself. As indicated above, a defendant at that time could not call witnesses in his own behalf, could not testify in his own behalf, had no right to counsel, and basically was confined to simply arguing that the prosecution had not proved its case. See *California v. Green*, supra at 177. See also *Ferguson v. Georgia*, 365 U.S. 570 (1961).

and the historical context of its passage, seems to adopt this view, and as to meaning states: "From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses."[8] Thus, the Confrontation Clause, as written in the Sixth Amendment, demonstrates an evolution in the law from 1603 until the time our Constitution was adopted. Although the writing has not changed, the evolution continues.

There can be little doubt that in the beginning "the paradigmatic evil the Confrontation Clause was aimed at (was) trial by affidavit."[9] Early decisions considering the right to confrontation all involve ex parte testimony and turn on the issue of availability and the hearsay rule.[10] Thus, for many years, the right to confrontation and the right to cross-examination developed as identical concepts. Accordingly, exceptions to the hearsay rule, which qualify the right to cross-examination, were regarded as compatible with the right to confrontation.[11] Furthermore, in joint trials where two or more defendants were tried for the same offense, a declaration made by one which incriminated both was admitted in evidence, without the maker's testimony, provided the court by proper instructions limited the application and told the jury that the statement could be considered only against the declarant. *Blumenthal v. United States*, 332 U.S. 539 (1947); *Delli Poali v. United States*, 352 U.S. 233 (1957). Of course, the non-testifying co-defendant's extrajudicial statement constituted inadmissible hearsay as to the incriminated non-confessor. Nevertheless, even though the hearsay rule was violated, the Confrontation Clause was satisfied. However, the decisions of this Court since *Delli Paoli* clearly demonstrate that the right to confrontation is something other than a constitutionalization of the hearsay rules.[12]

In 1968 this Court overruled *Delli Paoli* with the decision of *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, Bruton and one Evans were jointly tried and convicted of armed postal robbery. Neither testified upon their trial. Bruton made no admissions or confessions. However, Evans did confess to the postal authorities that he and Bruton committed the robbery in question and upon trial Evans' confession, including the portion which implicated Bruton, was received into evidence. In fact, the most damning evidence against Bruton was Evans' confession. This Court reversed Bruton's conviction and held that his rights under the Confrontation Clause had been violated because there was a substantial risk that the jury, despite instructions to the contrary, had looked to the incriminating statements made by Bruton's co-defendant. Three weeks later this Court

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[8] *California v. Green, supra* at 180.

[9] *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

[10] See *West v. Louisiana*, 194 U.S. 258, 265, 266 (1904); See also *California v. Green, supra*, 179-188; and cases cited within footnote 11 of this text. Of course, availability is still an important factor. *Compare Mancusi v. Stubbs*, 408 U.S. 204 (1972) and *Barber v. Page*, 390 U.S. 719 (1968); and so is the hearsay rule. See *Dutton v. Evans*, 400 U.S. 74 (1970); *Lutwak v. United States*, 344 U.S. 604 (1953); and *Krulewitch v. United States*, 336 U.S. 440 (1949).

[11] *See Doddell v. United States*, 221 U.S. 325, 330 (1911) (official documents); *Mattox v. United States*, 156 U.S. 237, 246-249 (1958) (witness dead); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (dying declarations); *See also* Note 44, St. John's Law Review 54, 64 (1969).

[12] For example, in *Pointer v. Texas*, 380 U.S. 400 (1965), the prior testimony exception to the hearsay rule permitted the introduction at trial of the transcript of a preliminary hearing. This Court reversed the convictions and held the defendants were denied their confrontation rights, despite the hearsay exception. Similarly, in *Barber v. Page*, supra, the prior testimony exception was used to again allow a preliminary hearing transcript. This court reversed and held that the right to confrontation had been violated by the failure of the state to make a good faith effort to secure the presence of the witness at trial. On the other hand, see *Dutton v. Evans*, supra, n. 10; *Lutwak v. United States*, supra, n. 10; *Krulewitch v. United States*, supra, n. 10, and *Mancusi v. Stubbs*, supra, n. 10.

held *Bruton* was retroactive and applied to the states. *Roberts v. Russell*, 392 U.S. 293 (1968).

The next year this Court decided the case of *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, this Court with Mr. Justice Douglas writing, held that a *Bruton* type violation can constitute harmless error.[13] In *Harrington*, four men were tried together—Harrington, a caucasian, and Bosby, Rhone, and Cooper, who were black. All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each of Harrington's co-defendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone testified, and Harrington's counsel cross-examined him. The other two individuals, Bosby and Cooper, did not take the stand. These facts are analogous to the case sub judice. Here, three black men and two white men have been convicted of murder in the perpetration of a robbery. Four of the individuals tried in state court made statements which were admitted at trial.[14] One of the

[13] The harmless error concept was no stranger to the Confrontation Clause. See *Motes v. United States*, 178 U.S. 458 (1899).

[14] (a). Joe Wood did not make a statement. (b). Robert Wood made a detailed lengthy statement which was recorded, transcribed, and signed. This statement was made in the presence of police officers and his attorneys. (Appendix, pp. 1-60). At trial, a redacted version was read by one of the police officers as part of the state's proof. (Appendix, pp. 61-105). (c). Isaiah Hamilton made an oral statement which the police immediately transcribed. (Appendix, p. 150). Hamilton was later questioned by police and the questions and answers were typed. The transcription was then read to him and he initialed each page and signed the last. (Appendix, p. 152). At trial, only a redacted version of the oral statement was admitted through the testimony of a police officer. (Appendix, p. 160). (d). James Randolph made two oral statements to different police officers. Redacted versions of these statements were admitted through the testimony of the two police officers. (Appendix, pp. 162, 163). (e). Wilbur Lee Pickens was questioned by police and the questions and answers were typed. Pickens initialed each page and signed the last page of the transcription. At trial, a redacted version of the transcription was read into the record by the questioning detective. (Appendix, p. 164).

individuals here, Robert Wood, testified at trial and was subject to cross-examination by the respondent's lawyers.[15] Much of the other evidence existing in the record identifies the individuals as three blacks and a white man. This is the same sort of other evidence which existed in the *Harrington* case. In reaching a finding of harmless error in *Harrington*, this Court stated:

> "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We, of course, do not know the jurors who sat. Our judgment must be based upon our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the mind of the average juror."

See *Harrington, supra*, 395 U.S. at 255.

In 1972 this Court decided the case of *Schneble v. Florida*, 405 U.S. 516 (1972). Schneble and his co-defendant Snell were tried jointly in a Florida state court for murder. Neither defendant testified at trial. However, police officers testified to a detailed confession that Schneble had given to them and one officer related a statement given to him by Snell. The statement of Snell, who did not testify, tended to undermine Schneble's initial version and to corroborate certain details of Schneble's confession. There was no redaction performed. This Court affirmed the conviction of Schneble, finding any violation of *Bruton* was harmless error beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt as manifested

[15] Although Robert Wood was subject to full cross-examination, two of the respondents, Hamilton and Randolph, chose not to cross-examine and Pickens' counsel asked only one question. See Robert Wood's testimony, (Appendix, pp. 149, 150). This fact is very curious since under any interpretation Robert Wood's testimony is much more inculpatory than the redacted statements here complained of. *See Brookhart v. Janis*, 384 U.S. 1 (1966).

by his confession, which completely comported with the objective evidence, and the comparatively insignificant prejudicial effect of Snell's statement. See *Schneble, supra,* 405 U.S. 429-431. In reaching the conclusion of harmless error this Court stated.

> . . . without Schneble's confession and the resulting discovery of the body, the state's case against Schneble was virtually nonexistent. The remaining evidence in the case —the disappearance of Mrs. Collier sometime during the trip, and Snell's statement that Schneble sat in the back seat of the car during the trip and never left Snell alone with Mrs. Collier—could not by itself convict Schneble with this or any other crime.

See *Schneble, supra* at 431.

For the purposes of the case sub judice, there are at least two lessons in *Schneble.* First, each of the respondents' own confessions must be considered as part of the quantum of proof in considering the issue of harmless error.[16] Second, the consistency and corroborative nature of the respondents' confessions must be considered in deciding whether the confession of a non-testifying co-defendant could have significantly affected the jury's verdict. Obviously, the rule of both *Harrington* and *Schneble* is that extrajudicial statements which are corroborative and consistent do little more than the individual's own confession has already done. That is to say, the effect of a non-testifying co-defendant's statement is simply cumulative.

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[16] Although recognizing this principle, it is obvious that the Sixth Circuit below had difficulty applying it in this case: "We recognize that the majority opinions in both *Harrington* and *Schneble* accepted the defendant's own confession as part of the evidence to be weighed as admissible in determining whether the violation of the *Bruton* rule was or was not harmless error. Since all three of these confessions were inadmissible at this joint trial, we find this holding conceptually difficult in this case." *Randolph, et al. v. Parker,* 575 F.2d 1178, 1182 (6th Cir. 1978).

In view of *Schneble* and *Harrington,* a closer look is required at the statements actually admitted at trial in this cause.[17] An examination of the statements admitted at trial necessitates the conclusion that they are consistent with each other. In fact, both the magistrate's report (Appendix, p. 291) and the opinion of the Supreme Court of Tennessee (Appendix, p. 239) reflect findings that the statements of Hamilton, Pickens, and Randolph are essentially alike in material details and are corroborative of one another. Furthermore, because of the redaction, these statements have little or no evidentiary value except against the confessor. The conclusion is obvious, the statements are only cumulative in their evidentiary value except for the incriminating effect against the makers.[18] Although the statements, as originally rendered, incriminated the co-defendants, the process of redaction was successful to the extent that this Court may fairly conclude that, as to the non-makers, the "probable impact . . . on the mind of the average juror" was negligible, and at best

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[17] As more fully explained in Footnote 14, supra, there were a number of statements taken by the police from four of the defendants in this case. However, the trial court supervised a laborious process of redaction and deletion, and the result was that the jury heard much less than the police had. In fact, although Hamilton had given both a short oral statement and had later been questioned in detail by police, at trial only a redacted version of the oral statement was admitted. The testimonial account of Hamilton's statement is approximately one page; that of the two Randolph statements is less than two pages; and the redacted entry of Pickens' statement amounts to approximately five pages. The record is in excess of 1000 pages, the trial consumed approximately two weeks.

[18] As described above, the process of redaction and deletion in this case was laborious and consumes a great portion of the state record. The process was largely successful. In Hamilton's statement, all references to Pickens and Randolph have been changed to "they" references. The only exception is the third sentence where the phrase "two other parties" is used. In Randolph's first statement, again only "they" references are used. In Randolph's second statement, the phrases are "two other parties", "they", and "another party". In Pickens' statement, the phrases are "two others", "we" and "guy" references. In fact, the "guy" reference in Pickens' statement is the only indication of sex in any of the four statements. There is no indication of race, or any other description.

cumulative. In fact, this process of redaction makes this case stronger then *Schneble, Harrington,* or *Brown v. United States,* 411 U.S. 223 (1973), wherein this Court also found harmless error.[19]

Perhaps the most important distinction between *Bruton* and the cases of *Harrington* and *Schneble* is the fact that in the latter two, the parties raising the *Bruton* objection had confessed themselves. The same is true in the case before this Court. This distinction is particularly important when considering an issue of harmless error. As Mr. Justice White stated in *Bruton*:

> "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.[20]

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[19] In *Schneble, Harrington,* and *Brown,* there was no redaction. In *Schneble* and *Brown,* the petitioners were directly named in the co-defendant's statement as admitted at trial. See *Schneble, supra,* at 430 and *Brown, supra,* 231, footnote 5. In *Harrington,* the petitioner was not named but Bosby's confession referred to Harrington as "a blond headed fellow" or the "white guy" or the "Patty"; and Cooper's confession referred to Harrington as "the white boy" or "this white guy". Of course, as mentioned above, Harrington, a caucasian, was being tried with three blacks. The difference is obvious, in neither *Harrington, Schneble,* or *Brown,* did the jury have to speculate with regard to the reference. In the case sub judice, any conclusion would be speculation.

[20] *Bruton, supra,* 391 U.S. 139, 140 (White, J., dissenting).

In deciding *Schneble* and *Harrington,* this Court obviously considered the defendant's own confession against himself and also considered the testimony of the co-defendant who took the stand and was cross-examined. Therefore, these two pieces of evidence automatically become part of the quantum of proof necessary to find harmless error. The only evidence in the record which is struck from the equation is the substantive content of the non-testifying co-defendant's confessions. However, the fact that these confessions are corroborative and consistent should be considered by the reviewing court in determining their probable impact. Applying these principles to the instant case, the proof against each of the respondents includes his own confession, the inculpatory confession[21] and testimony of Robert Wood, the fact of corroboration and consistency in the excluded confessions, and all other evidence in the record. Using this formula to determine what evidence should be considered, a reviewing court should then determine what was the probable impact of the two confessions, which are to be struck from the equation, on the mind of an average juror. Using this formula,

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[21] As indicated above, Robert Wood gave a detailed statement to police prior to his arrest. *See* footnote 14. A redacted version of this statement was admitted as part of the state's proof prior to Robert Wood's testimony. The redaction and deletion process was necessary since the state could not anticipate the subsequent testimony of Robert Wood. However, Robert Wood did subsequently testify and was available for cross-examination. Robert Wood's statement was much more detailed than any of those here complained of. Consequently, the redaction and deletion process was arguably less successful. For example, the redacted version of Robert Wood's statement contains some physical descriptions of the respondents (Appendix, pp. 89, 90), and describes their number as three (Appendix, p. 86), leaves no doubt as to their sex (Appendix, p. 84), places weapons on the intruders (Appendix, p. 89), and in some places refers to them as "blank". However, any complaint that the redacted version incriminates the respondents is cured by Wood's subsequent testimony and their opportunity to cross-examine. Therefore, after Wood's subsequent testimony, the jury was constitutionally permitted not only to consider his testimony against the respondents, but to fill in the "blanks" and consider the redacted statement against them also.

which is drawn from the *Schneble* and *Harrington* decisions, the decision of the Court of Appeals is erroneous. The most reasonable conclusion is that any error committed in the admission of the two non-testifying co-defendants' confessions is clearly harmless.

Looking specifically at the admissible evidence, the scenario of this crime is clearly set out in the testimony of Robert Wood, Tommy Thomas, and the redacted statement of Robert Wood.[22] At least five other witnesses testified to facts they observed at the time of the crime. These people were not inside the apartment, but their testimony corroborates the testimony of those who were.[23] Further state evidence shows the recovery of the weapons from Hamilton's attic where they were hidden.[24] The testimony of Tommy Thomas identifies the respondents as "three Negroes," and this fact is corroborated by the witnesses outside.[25] Robert Wood's testimony identifies the three blacks, mentioned in the testimony of at least six other people, as the respondents: Hamilton, Pickens, and Randolph.[26] All this evidence constitutes proof which was properly admitted as to all three respondents. To complete the equation, the redacted statement of each respondent must then be separately added to this proof and the result weighed. The results are conclusive: the evidence is overwhelming. The only real issue is identification: Whether Hamilton, Pickens, and Randolph were the three blacks who broke down

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[22] Appendix, pp. 61-105.

[23] For example, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment after the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing "a white man and three blacks" at the apartment at the time the robbery was committed.

[24] State Record, pg. 818.

[25] See footnote 23, supra, and Appendix p. 183.

[26] State Record, pp. 894, 912, 918, 920 and 921 and Appendix, pp. 117, 136, 142, 144.

the door to complete the murder-robbery. In each case, the respondent's own statement[27] basically adds the final touch—direct admission of involvement in the entire scheme, incrimination of self only, and corroboration of the details. If one continues the equation by then adding the co-defendants' statements, nothing is gained. The evidence then becomes cumulative.

The only real factual issue was, and still is, identification. However, the legal issue—the application of the felony-murder rule—seems to overshadow this factual issue. Both the court of appeals and the district court seem bothered by the murder conviction, although finding the state felony-murder rule properly applied.[28] In fact, the Court of Appeals states, "there might be reasons to reach a different conclusion as to these defendants if they were contesting a jury verdict of armed robbery rather than first degree murder." *Randolph, et al. v. Parker, supra,* 575 F. 2d at 1182. This conclusion implies that the identification issue is settled in the state's favor. However, this conclusion incorrectly implies that first degree murder here would require anything more than proof of armed robbery and a related homicide, which are amply proven. The result is the misuse of *Bruton* to redecide a question of state law which was correctly decided by the Supreme Court of Tennessee.[29]

There has existed for some time, considerable split and confusion among the various circuits as to the application of *Bruton*

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[27] The petitioner is cognizant of the district court's finding that Pickens' confession was admitted in violation of *Miranda*. See Appendix, p. 324. The Court of Appeals' decision affirmed this finding in the last sentence of its opinion. This Court limited the writ of certiorari to the *Bruton* issue. The petitioner hopes that a favorable decision here and remand may cause the Court of Appeals to reconsider. If not, the only effect would be to weaken the identification of Pickens by eliminating his own admissions.

[28] See Magistrate's Report on Reference, Appendix, pp. 283-285; and District Court Memorandum, Appendix, p. 322.

[29] See Appendix, p. 227.

to facts which are not on point with *Bruton*. Simply stated, if the case sub judice had arisen in another circuit, then the decision quite probably would be different. This split among the circuits is expressly recognized in the Sixth Circuit opinion.[30] Judicial attempts in the various circuits and in many states to distinguish cases such as the one sub judice from *Bruton* have resulted in the evolution of several "interlocking confession" concepts which have been impliedly sanctioned by this Court. See *Catanzaro v. Mancusi*, 404 F.2d 296 (1968), *cert. denied*, 397 U.S. 942 (1970); and *People v. Moll*, 256 N.E.2d 185 (N.Y. 1970), *cert. denied* 398 U.S. 911.

There is considerable discussion in the interlocking confession concepts as to whether *Bruton* is inapplicable to such cases, or whether *Bruton* applies but the interlocking nature of the confessions requires a finding of harmless error. See *Ortez v. Fritz*, 476 F.2d 37 (2nd Cir. 1973). The first position contends that *Bruton* simply does not apply to situations where both defendants confess and the confessions interlock because of their corroborative nature.[31] The second position contends that *Bruton* does apply but the violation is harmless error in light of the two interlocking confessions.[32] The practical effect of both positions

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[30] *Randolph, et al., supra*, p. 1184.

[31] See *Stewart v. Arkansas*, 519 S.W.2d 733 (1975); *People v. Moll*, 256 N.E.2d 185 (N.Y. 1970) *cert. denied*, 90 S. Ct. 1707 (1970); *United States ex rel. Dukes v. Wallack*, 414 F.2d 246 (2nd Cir. 1969); *United States v. Venere*, 416 F.2d 144 (5th Cir. 1969) (no jury); *McHenry v. United States*, 420 F.2d 927 (10th Cir. 1970); *Bunton v. Commonwealth*, 464 S.W.2d 810 (Ky. 1971); *Oneil v. State*, 455 S.W.2d 597 (Tenn. 1970); and *State v. Hall*, 178 N.W.2d 268 (Neb. 1970).

[32] See *People v. Rosochacki*, 244 N.E.2d 136 (Ill. 1969); *Jones v. Florida*, 227 So.2d 326 (Fla. App. 1969); *Connecticut v. Oliver*, 273 Atl.2d 867 (1970); *People v. Rayes*, 266 N.E.2d 539 (Ill. App. 1970); *State v. Anderson*, 229 So.2d 329 (1969), rev'd on other grounds, 403 U.S. 949; *State v. Brinson*, 177 S.E.2d 393 (N.C. 1970).

is the same. Further, and more important, the application of these cases would result in a different decision than reached in this case by the Sixth Circuit. The Sixth Circuit's decision in this case conflicts with the decisions reached in at least six other circuits. Although the results reached the Second, Third, Fifth, Seventh, Eighth, and Tenth circuits differ somewhat in reaching their conclusion, the basic conclusion is consistent and clear—confessing co-defendants whose confessions are consistent and corroborative do not stand in the same shoes as Mr. Bruton.

In *Catanzaro v. Mancusi*, 404 F.2d 296 (2nd Cir. 1968) three individuals were tried and convicted of murder in New York state court. The confession of Catanzaro and his non-testifying co-defendant, McChesney, were admitted at the joint trial. Catanzaro sought a writ of habeas corpus and relied upon *Bruton*. The Second Circuit denied the writ and affirmed the conviction, stating:

> The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a co-defendant who did. In our case Catanzaro himself confessed and his confession interlocks and supports the confession of McChesney.
>
> Where the jury has heard not only a co-defendant's confession, but the defendant's own confession, no such devastating risk attends the lack of a confrontation as what was thought to be involved in *Bruton*."

See *Catanzaro, supra*, at p. 300.

Simply stated, the Second Circuit in *Catanzaro* refused to apply the sanctions of *Bruton* because of the distinctions between that case and *Bruton*. The major distinctions were confessions by both defendants, instead of only one, and the interlocking nature of the confessions. See also *United States ex rel. Duff v. Zelker*, 452 F.2d 1009 (2nd Cir. 1971).

In *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971) two state co-defendants had been tried and convicted of murder. Both had made complete confessions which were admitted at trial with instructions that such were admissible only against the declarant. In a habeas corpus proceeding the district court granted the petitions under the authority of *Bruton*. The Tenth Circuit reversed the district court and stated: "We need not concern ourselves with the legal nicety as to whether the instant case is without the *Bruton* rule, or is within *Bruton* and the violation thereof constituting only harmless error. In either event the judgment of the trial court (district court) must be reversed". In reversing the district court, the Tenth Circuit discussed and was persuaded by the rationale of both *Harrington* and *Catanzaro*.

In *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972), *cert. denied*, 409 U.S. 1011 (1972), Spinks and one Turner were tried together and convicted of robbery in federal court. Spinks and Turner had both given confessions with no substantial factual differences. The other three individuals involved in the robbery did not confess and apparently their trials were severed for this reason. Turner's confession implicated Spinks, and Turner did not testify. In affirming the conviction the Seventh Circuit cited *Catanzaro*, *Schneble*, and *Harrington*, and further stated:

> There is no merit in Spinks' claim that he was prejudiced by denial of the right to cross-examine Turner. It would be ludicrous to have Spinks trying to break down Turner's confession, which implicated Spinks, while Spinks' own confession remained unchallenged, and even if Turner's confession had been excluded from the evidence—or even if Spinks' motion for severance had been granted—Spinks would still be faced with his own confession.

See *Spinks, supra*, at 66; see also *United States, ex rel. Long v. Pate*, 418 F.2d 1028 (7th Cir. 1969).

In *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976), the two defendants had been convicted in District Court of armed robbery. Both defendants confessed, and both confessions, implicating the other defendant, were admitted at trial. There was no redaction in the confessions and neither defendant testified at trial. The Eighth Circuit affirmed the conviction and the opinion does much to elucidate the law relating to interlocking confessions, *Bruton*, and *Harrington*. The Eighth Circuit stated: "It is now well established that *Bruton* does not automatically call for a reversal where interlocking confessions of a co-defendant tried at the same time are admitted in evidence, and that there should be no reversal where the appellate court is convinced that a complaining defendant was not subjected to a substantial risk of incurable prejudice as a result of the admission of his co-defendant's confession." See *Walton*, 538 F.2d at 1353. In reaching this conclusion in *Walton* the Eighth Circuit, like the Tenth Circuit in *Metropolis* found that from a practical standpoint it made no difference whether the Court held the admission of the confessions was not erroneous or whether they found the error harmless beyond a reasonable doubt. The Eighth Circuit also cited both *Harrington* and *Catanzaro* in supporting their decision. See also *Hall v. Wolff*, 539 F.2d 1146 (8th Cir. 1976).

In *Mack v. Maggio*, 538 F.2d 1229 (5th Cir. 1976), three co-defendants had confessed to the same crime. The confessions interlocked with only slight variances, and they were admitted with none of the confessors testifying. Two of the state prisoners sought federal habeas corpus relief which was refused by the district court. The Fifth Circuit affirmed and found that *Bruton* was inapplicable to such situations.

In *United States v. Digilio*, 538 F.2d 972 (3rd Cir. 1976) three men, Digilio, Lupo, and Szwandrak were convicted in the United States District Court for conspiracy. Statements taken by the F.B.I. from Lupo and Szwandrak were admitted at the

joint trial. These statements were redacted when read to the jury and neither Lupo or Szwandrak testified. All references to Digilio were deleted. The Third Circuit expressly disapproved of the suggestion that there is "a parallel statement" exception to the *Bruton* rule. Nevertheless, the Third Circuit affirmed the conviction on the basis of harmless error and in doing so mentioned a corroborative effect of the consistent confessions.

The petitioner submits that a close reading of the cases, both federal and state, construing *Bruton* demonstrates there is no interlocking confession doctrine, nor is there a simplistic parallel statements rule operating as an exception to *Bruton*. Although many cases turn on the question of whether *Bruton* applies, most recognize the answer requires the consideration of a number of factors of which interlocking and parallel characteristics may be one. This rationale is proper is since the paramount issue is not, and never was, whether or not *Bruton* is violated, but whether the defendant's Sixth Amendment right to confrontation has been impugned. *Bruton* may assist in this resolution but certainly is no more important than the facts, and other relevant cases construing the Confrontation Clause.[33] Thus, a reviewing court should consider whether the devastating effect, addressed in *Bruton*, has been eliminated by a successful redaction and deletion process. Accordingly, a reviewing court should inquire whether the admission of the defendant's own confession has eliminated the risk of prejudice which may have resulted

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[33] The distinctions between this case and *Bruton* are as real as the distinctions recognized in *Frazier v. Cupp*, 394 U.S. 731 (1969) and *Dutton v. Evans*, 400 U.S. 74 (1970). In *Frazier* the prosecutor, in good faith, told the jury in opening argument the substance of a co-defendant's statement which incriminated Frazier. The co-defendant did not testify. This Court affirmed the conviction and relied in part on the curative instructions of the trial judge. In *Dutton*, a Georgia evidentiary statute was the basis for allowing inculpatory hearsay. This Court affirmed, finding a lack of devastating impact. Both cases involved more direct incrimination than this one.

from the admission of his co-defendant's confession. The consistency and corroborative nature of the confessions should be considered in attempting to determine whether they are cumulative in their impact on the mind of an average juror. Other factors, such as the other evidence in the record and any cautionary instructions given by the trial judge, should be considered in attempting to determine whether the right to confrontation has been impermissibly violated. When these considerations are made here, only one of two conclusions can be reached: Either, (1) the Sixth Amendment has not been violated; or (2) any violation is harmless beyond a reasonable doubt. The Confrontation Clause has never meant an absolute right to cross-examination, nor has the Clause ever been an absolute bar against hearsay. The Sixth Amendment has been satisfied in this case, when the entire record is considered and an overly technical application of *Bruton* is avoided. On more than one occasion, this Court has stated that a defendant is entitled to a fair trial but not a perfect one. *E.g., Lutwak v. United States*, 336 U.S. 440 (1949).

CONCLUSION

About a half a century ago Mr. Justice Cardozo writing in the Sixth Amendment case of *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) stated, "There is danger that the criminal law will be brought into contempt—that discredit will even touch the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free". Here too, the record establishes the guilt of the respondents without question and the possibility of prejudice from the issue before this Court is gossamer. For these considerations, and for the others mentioned above, the State of Tennessee respectfully prays that this Court will reverse the

Court of Appeals for the Sixth Circuit and remand this case to the Sixth Circuit for further consideration.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-99

HARRY PARKER,

Petitioner,

v.

JAMES RANDOLPH, WILBURN LEE PICKENS, AND ISAIAH HAMILTON,

Respondents.

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

SUMMARY OF ARGUMENT 1

RESPONDENTS' STATEMENT OF THE CASE 2

ARGUMENT 8

I. The Admission Into Evidence of the Statements and Confessions of the Confendants which implicated each other, but where neither codefendant took the stand to testify or was available for cross-examination by his codefendants, violated the confrontation clause of the Sixth Amendment to the U.S. Constitution and the rule of this Court as set forth in *Bruton* v. *United States*. 8

II. The Admission Into Evidence of Re-Respondents' Statements and Confessions in violation of the *Bruton* rule of exclusion was not harmless error. 25

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. *Louisiana*, 403 U.S. 949 (1971) 10, 13, 16, 17, 19, 20 21, 22, 23

Anderson v. *United States*, 417 U.S. 211 (1974)... 10

Blumenthal v. *United States*, 332 U.S. 539 (1947) 10

Brown v. *United States*, 411 U.S. 223 (1973)..... 13, 21, 22, 23, 25, 34

Bruton v. *United States*, 391 U.S. 123 (1968) .. *passim*

Catanzaro v. *Mancusi*, 404 F.2d 296 (2d Cir 1968) cert. denied, 397 U.S. 942 (1970)..... 9, 38

Chapman v. *California*, 386 U.S. 18 (1967) 15, 16, 25, 26

Davis v. *Alaska*, 415 U.S. 308 (1974)..... 10

Delli Paoli v. *United States*, 352 U.S. 232 (1957) 14

Douglas v. *Alabama*, 380 U.S. 415 (1965)..... 11

Fahy v. *Connecticut*, 375 U.S. 85 (1964)..... 25

Harrington v. *California*, 395 U.S. 250 (1969) ..... *passim*

Ker v. *California*, 374 U.S. 23 (1963)..... 27

Miranda v. *Arizonia*, 384 U.S. 436 (1966) 5, 6, 7

Nelson v. *O'Neil*, 402 U.S. 622 (1971) 13

Ortiz v. *Fritz*, 476 F.2d 37 (2nd 1973) 38

Pointer v. *Texas*, 380 U.S. 400 (1965) 10

Randolph v. *Parker*, 575 F.2d 1178 (6th Cir. 1978)..... 7, 8, 32, 39

Roberts v. *Russell*, 392 U.S. 293 (1968)..... 13

Schneble v. *Florida*, 405 U.S. 427 (1972)..... *passim*

Page

Schneble v. *State*, 201 So.2d 881 (Fla. 1967), 215 So.2d 661 (Fla. 1968)..... 19

State v. *Anderson*, 254 La. 1107, 229 So.2d 329 (1969) 16, 17

United States v. *Di Gilio*, 538 F.2d 972 (3rd Cir 1976)..... 24

STATUTES

Tennessee Code Annotated 39-2402 21

MISCELLANEOUS

5 Wigmore, Evidence § 1395 at 123 11

"*Felony Murder—Dangerous Felonies*", *50 A. L.R. 3d 399 (1973)* *8*

IN THE

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HARRY PARKER,

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v.

JAMES RANDOLPH, WILBURN LEE PICKENS AND ISAIAH HAMILTON,

Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968); *Schneble* v. *Florida*, 405 U.S. 427 (1972); and *Harrington* v. *California*, 395 U.S. 250 (1969).

SUMMARY OF ARGUMENT

1. The admission into evidence of the statements and confessions of the codefendants which implicated

each other, but where neither codefendant took the stand to testify or was available for cross-examination by his codefendants, violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and the rule of this Court as set forth in *Bruton* v. *United States.*

2. The admission into Evidence of Respondents' statements and confessions in violation of the *Bruton* rule was not Harmless Error.

RESPONDENTS' STATEMENT OF THE CASE

Five defendants, Robert Wood, and his brother, Joe Wood (both white); James Randolph, Wilburn Lee Pickens and Isaiah Hamilton (all black) were jointly indicted, tried and convicted by a state trial court (in Memphis, Shelby County, Tennessee) on July 25, 1972 of murder in the perpetration of a robbery[1] and each sentenced to life imprisonment in the (Tennessee) State Penitentiary.

At trial the defendant Robert Wood, who had previously given the police an exculpatory statement

[1] Tennessee Code Annotated 39-2402 provides in pertinent part as follows:

> 39-2402, *Murder in the First Degree*—An individual commits murder in the first degree if . . .
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

prior to his indictment, in an effort to promote a "self-defense" theory, admitted that he shot the Las Vegas gambler, William Douglas, who he thought was cheating him. This shooting occurred prior to the entrance of "other parties" into the room. Robert Wood thereafter took all the money off the table (some of which belonged to him), and stuffed it in his pockets.

There were only two eyewitnesses to the shooting, Robert Wood, who fired the fatal shot, and Tommy Thomas, (the son of Titanic Thomas, another big-time Las Vegas gambler), who supposedly was a friend of both the victim and Robert Wood.

Neither of the respondents (Randolph, Pickens or Hamilton) were involved in the gambling game between Douglas and Robert Wood. They were not in the room (and had not been) when Robert Wood killed Douglas. Thomas, the only other person in the room at the time of the shooting was not a participant in the game, and was there merely as an observer.

Robert Wood had never seen nor met Randolph or Pickens prior to the shooting. He had seen Hamilton only casually, and knew him as one who worked for his brother, Joe Wood, at his used car lot. But, he had never met with either Randolph, Pickens or Hamilton prior to the shooting to discuss or "plan" anything. Further, Robert Wood did not know either respondent was coming to the scene of the poker game as part of a pre-arranged plan. Hamilton was one of those blacks, he said, who came into the room "after the

shooting" and he "assumed" that Randolph and Pickens were the other two "blacks" because he allegedly met them later, away from the scene of the shooting over at Hamilton's apartment.

The in-court testimony of Robert Wood was contrary to his initial statement to the police when he stated very positively that he could not identify the "three blacks" who came into the room and shot the victim and robbed the poker game. Both the exculpatory (out of court) statement of Robert Wood and his in-court testimony were presented to the jury.

Aside from the confessions of the respondents and the testimony of Robert Wood, there is no other evidence in the record identifying the respondents as the "three blacks" who were at the scene after the shooting and supposedly assisted Joe Wood in kicking in the door. Tommy Thomas was not able to identify them, and Joe Wood did not testify at trial, give a statement or confess.

The critical proof concerning the respondent's involvement in the crime was presented to the jury by the admission into evidence of two oral statements made by Randolph, an oral statement of Hamilton and a written statement of Pickens, through the testimonies of various police officers.

Each respondent challenged the admissibility of his own statement and those of their codefendants on the grounds that the confessions were not voluntary, secured in violation of their constitutional rights under

Miranda v. *Arizona*,[2] were inaccurate and did not contain substantially what they told the police. The pretrial motions of the respondents for severance had been denied by the trial judge.

Neither of the three black codefendants, Randolph, Pickens or Hamilton took the stand to testify at trial before the jury. Each was represented by separate retained counsel. The statements attributed to them incriminated one another. They had no opportunity to confront and cross-examine one another on the contents of the statements.

The Tennessee Court of Criminal Appeals (on June 5, 1974) reversed the convictions of the defendants and ruled that (a) *the entire record and testimony of the trial does not support the theory that the shooting was a part of a robbery attempt* and (b) the rule set forth in *Bruton* v. *United States*, 391 U.S. 123 (1968) was violated and defendants Randolph, Pickens and Hamilton were denied their Sixth Amendment right to confrontation of witnesses against them.[3]

The Supreme Court of Tennessee (on December 15, 1975) in an overly broad interpretation of the "felony-murder rule" reversed the decision of the Court of Criminal Appeals and upheld the convictions of each defendant, as determined by the jury and ruled that (a) the evidence in the record was sufficient to support the conviction for "felony-murder", (b) the interlock-

[2] 384 U.S. 436. (1966)

[3] See opinion of court in Appendix, pages 215-226

ing inculpatory confessions of Randolph, Pickens and Hamilton demonstrated the involvement of each as to crucial facts such as time, location, felonious activity and awareness of the overall plan or scheme, and (c) the *Bruton* analysis does not apply to this case, because unlike in *Bruton*, Hamilton, Randolph and Pickens, all confessed with similar, intervening versions of their own actions.[4]

In a habeas corpus proceeding, Chief Judge Bailey Brown of the United States District Court for the Western District of Tennessee, after considering the evidence presented at the evidentiary hearing on Picken's claim of denial of right to counsel, the arguments of attorneys on the *Bruton* question and consideration of the record as a whole, issued his memorandum decision (on May 2, 1977) and *ruled that (a) The admission in evidence of Pickens' confession was a constitutional error in that it violated his right to counsel as set out in Miranda*, and (b) The right of the petitioners, Randolph, Pickens and Hamilton to confrontation and cross-examination was violated under *Bruton* and he could not find that the violation of the Bruton principle was "harmless error beyond a reasonable doubt."[5]

The United States Court of Appeals for the Sixth Circuit, on appeal filed by the State of Tennessee,

[4] See opinion of court in Appendix, pages 227-246

[5] See Memorandum Opinion of the Court in Appendix, pages 321-326

affirmed in total the Chief District Court Judges' findings of fact and conclusions of law on both issues. It also rejected the "interlocking" confession theory promoted by the Second Circuit as constituting an exception to the *Bruton* rule.[6]

All four courts which have reviewed and considered the convictions and claim of respondents have failed to analyze "the whole record" in determining the facts as to respondents' involvement in the crime. They have merely recited and accepted the factual theory "most favorable" to the State.[7]

This Court granted certiorari to review only the *Bruton, Schneble* and *Harrington* issue. Respondents, therefore, submit that the refusal of this Court to review the findings of the District Court and Sixth Circuit Court of Appeals that Pickens' confession was admitted in violation of his Sixth Amendment Right to counsel as enunciated under *Miranda* constitutes a final adjudication of that issue.

[6] See *Randolph* v. *Parker*, 575 F. 2d 1178 (6th Cir. 1978); also, Appendix C, Petition for Writ of Certiorari.

[7] Respondents do not agree with the factual theory set forth by the State as will be shown in the argument herein.

ARGUMENT

I

THE ADMISSION INTO EVIDENCE OF THE STATEMENTS AND CONFESSIONS OF THE CODEFENDANTS WHICH IMPLICATED EACH OTHER, BUT WHERE NEITHER CODEFENDANT TOOK THE STAND TO TESTIFY OR WAS AVAILABLE FOR CROSS-EXAMINATION BY HIS CODEFENDANTS, VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U. S. CONSTITUTION AND THE RULE OF THIS COURT AS SET FORTH IN *BRUTON* V. *UNITED STATES*.[8]

Three of the four courts which have reviewed the convictions of the three respondents have determined that their (the respondents) constitutional right to confrontation of witnesses were violated at trial and that their convictions should be overturned. Only the Supreme Court of Tennessee, in an overly broad interpretation[9] of the "felony-murder" rule[10] and adop-

[8] *Supra*, 391 U.S. 123 (1968)

[9] See *Randolph* v. *Parker*, *Supra*, 575 F. 2d, at 1181. The Tennessee Court of Criminal Appeals denied that there was a sufficient basis for a finding of "felony murder" because the murder took place *before* any alleged robbery attempt was made. See Appendix, Page 218. The Tennessee Supreme Court, relying heavily on *Wharton's Criminal Law and Procedure* and applying the *res gestae* rule found that the evidence was sufficient within the Tennessee felony-murder statute to uphold the convictions.

[10] The Felony-murder rule is "one of the most controversial doctrines in the field of criminal law." 50 ALR 3d 399.

tion of the "interlocking confession" theory[11] reached a contrary result.

In arriving at similar conclusions of law, the Tennessee Court of Criminal Appeals, the United States District Court for the Western District of Tennessee, and the United States Court of Appeals for the Sixth Circuit based their decisions on the factual theory relied upon by and most favorable to the State in setting aside the convictions. But, a closer reading and examination of the record could suggest another theory of the facts concerning the respondents' involvement which would be as consistent with innocence as the one suggested by the State of Tennessee of guilt.

If the tainted statements of the respondents were cancelled from the evidence, a logical conclusion could be reached that the two (white) brothers, Robert and Joe Wood, possibly along with Tommy Thomas, planned the robbery and murder of William Douglas and then tried to "set up" the three black men, who had no knowledge of the plan. Also, the three blacks may not have even entered the apartment where the shooting took place or even been armed on the night of the incident.

It is therefore important for this Court to fully analyze the facts and base its judgment upon its "own

[11] This theory is believed to have originated in the United States Court of Appeals for the Second Circuit, See *Catanzaro* v. *Mancusi*, 404 F. 3d 296 (1968), cert. denied, 397 U.S. 942 (1970).

reading of the record" and the "probable impact" of the evidence and confessions on the minds of the jury.

Right to Confrontation and Cross-Examination

One of the most important elements of a fair trial is that a jury consider only relevant and competent evidence in determining the facts and arriving at a verdict in a trial against a defendant.[12] The United States Constitution sets forth certain enumerated rights which are available to all persons, without regard to their innocence or guilt, to assure that a fair process and procedure is employed during the judicial process.

It is the integrity of the fact-finding process and procedure of trial which the Confrontation Clause of the Sixth Amendment seeks to remain inviolate. This provision of the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right would be meaningless without the opportunity for cross-examination.[13]

This Court has consistently held and made it clear that "the right to cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Pointer* v. *Texas*, 380 U.S.

[12] See, e.g., *Blumenthal* v. *United States*, 332 U.S. 539 (1947)

[13] Denial of right of effective cross-examination is a constitutional error of the first magnitude. See e.g. *Davis* v. *Alaska*, 415 U.S. 309 (1974); *Anderson* v. *United States*, 417 U.S. 211 (1974)

400, 401 (1965); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) Mr. Chief Justice Burger, speaking for the majority in *Davis* v. *Alaska*, 415 U.S. 308 (1974), stated that "confrontation means more than being allowed to confront the witness physically", *Id.*, at 315; "the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*," (*Id.*, at 315-316, citing Professor Wigmore at 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

The extent of the right to cross examine witness (as a part of the Confrontation Clause) was fully examined by Mr. Justice Brennan in delivering the Opinion of the Court in *Bruton* v. *United States, Supra.* The rules which he articulated in that decision established certain basic guidelines and standards upon which the Court should rely in deciding this case.

The Bruton Issue

The decision of the Sixth Circuit Court of Appeals in affirming the decision of the District Court, contains a well reasoned analysis of the case of *Bruton* v. *United States, Supra*, and correctly applied it to the facts of this case. The Court left little doubt that it was convinced that the constitutional rights of the respondents were violated by the admission into evidence of their confessions without the opportunity for cross-examination. In deciding the *Bruton* issue the Court correctly compared and interpreted *Harrington* v. *California*, 395 U.S. 250 (1969) and *Schneble* v.

Florida, 405 U.S. 427 (1973) and made it clear that those cases did not overrule *Bruton* but applied to certain specific facts not present in this case.

In *Bruton* the Court detailed the factual basis of the constitutional deprivation so that the application of the legal principles to a fact situation would be clear. The facts showed that at the joint trial of Evans and Bruton for armed robbery of a post office, a postal official testified that Evans orally confessed to him that Evans and Bruton committed the robbery. Otherwise, the evidence against Bruton was weak. Bruton made no admissions or confessions. Neither Bruton nor Evans took the stand and testified, and the Trial Court gave the usual limiting instruction. This Court reversed Bruton's conviction, ruling that there was a "substantial risk" that the jury looked to the incriminating extrajudicial statements in determining Bruton's guilt, and that the admission of Evans' confession in this joint trial violated Bruton's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This Court said that:

> "Plainly, the introduction of Evans' confession *added substantial, perhaps even critical*, weight, to the Government's case in a form not subject to cross-examination, since Evans did not take the stand . . . (emphasis added)" [*Id.*, 391 U.S. at 127-128]

The lesson of *Bruton* is that in joint trials, limiting instructions by a Judge for the jury to disregard any references and implications to a codefendant cannot

be accepted "as an adequate substitute for petitioner's constitutional right of cross-examination", where the confessor does not take the stand to testify. *Bruton, Supra* at 137.

The holding of *Bruton* was reiterated by the Court in *Roberts* v. *Russell*, 392 U.S. 293 (1968) and reaffirmed in *Harrington* v. *California*, 395 U.S. 250, 252 (1969); *California* v. *Green*, 399 U.S. 149 (1970); *Nelson* v. *O'Neil*, 402 U.S. 622, 628 (1971); and *Anderson* v. *Louisiana*, 403 U.S. 949 (1971); *Schneble* v. *Florida*; 405 U.S. 427, 430 (1972); and *Brown* v. *United States*, 411 U.S. 223, 230-231 (1973).

The state in its Petition for Writ of Certiorari and brief on the merits has liberally cited and heavily relied upon *Harrington* and *Schneble* to persuade this Court that the Bruton rule should not apply to this case. It has, however, erroneously compared the crucial facts of this case to *Harrington* and *Schneble* rather than *Bruton*. Such factors as the racial makup of the parties, and number of parties involved, though similar to those in *Harrington*, do not constitute that similarity of facts which is important on the question of stare decisis. Neither is there that other "overwhelming evidence of guilt" which existed in *Harrington* and *Schneble*.

Both *Harrington* and *Schneble* stand for the proposition that a violation of the *Bruton* rule in the course of a trial does not require reversal, if the evidence of guilt is "so overwhelming", that the prejudicial effect

of the codefendants admission is so comparatively insignificant as to clearly be "harmless error." *Harrington*, 395 U.S. at 254; *Schneble*, 405 U.S. at 1058-1960.

The specific question addressed by the Court in *Bruton* was "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." *Bruton*, 391 U.S. at 124. Mr. Justice Brennan, in speaking for the majority, declared that there is "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt." *Id.*, at 126. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), which *Bruton* overruled, had assumed that the violation of this constitutional right which occurs when a non-testifying codefendant's confession inculpates a defendant could be remedied by an instruction to the jury to disregard the inadmissible hearsay evidence in considering the defendant's guilt.[14]

Bruton reversed the petitioner's conviction without any consideration of whether the error committed was harmless. If left open the possibility that the right to confrontation of witnesses was among those constitutional rights which, are "so basic to a fair trial that

[14] *Bruton* effectively repudiated this assumption See Mr. Justice Brennan's statement at 391 U.S. 128.

their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U.S., 18, 24 (1967).

Since this Court decided *Bruton*, it has never explicitly discussed *Bruton's* applicability to the defendant who has confessed. But, an analysis of post-*Bruton* type cases shows that the Court's holdings have been fully consistent with the position that the *Bruton* rule applies in every case in which a codefendant's confession inculpates in defendant, regardless of the nature of the other material in evidence against the defendant.

One year after *Bruton* was decided, the Court ruled that under certain factual situations a *Bruton* violation may nevertheless be "harmless beyond a reasonable doubt." *Harrington* v. *California* 395 U.S. 250 (1969).

In *Harrington*, a white man, and three blacks were jointly tried and convicted of felony murder in the state courts of California. Harrington, while not confessing outright that he had committed the offense, made certain incriminating admissions, which placed him at the scene of the crime. The three blacks confessed, and while they did not implicate Harrington by name, their confessions contained allusions to a white participant that clearly referred to Harrington. One of the blacks testified, and was cross-examined by Harrington's attorney. The other two blacks did not testify. All three of the confessions were admitted in evidence with the usual cautionary instructions.

This Court affirmed Harrington's conviction by reference to the "harmless error" rule laid down in *Chapman* v. *California, Supra,* 386 U.S. 18 (1967). The Court pointed out that apart from the confessions of the two non-testifying codefendants, the case against Harrington was a strong one including the facts that (1) counsel for Harrington had the opportunity to cross-examine the codefendent who did testify, (2) that the confessions of the codefendants who did not testify were simply cumulative, (3) several eye witnesses placed Harrington at the scene of the crime. (4) Harrington placed himself at the scene of the crime. Thus, the Court in Harrington was not able to "impute reversible weight to the two confessions [of the non-testifying co-defendants]." 395 U.S. at 254.

The *Harrington* Court flatly stated that "the rule of *Bruton* applies here." *Id.,* at 252, and proceeded to consider whether the *Bruton* error required reversal. Thus, *Bruton* was said to have been violated where the inculpating information contained in the confessions of two non-testifying codefendants simply duplicated the information contained in the appellant's own statement.

In 1971, *Anderson* v. *Louisiana* 403 U.S. 949 (1971), reversing *State* v. *Anderson,* 254 La. 1107, 229 So. 2d 329 (1969), presented a fact situation much more closely resembling the case before this court. Four codefendants appealed from convictions for aggravated rape, a capital offense in Louisiana. Each had confessed to rape of the same victim, and

named the other three defendants as participants. In a one sentence per curiam opinion, this Court reversed the convictions, citing *Bruton.* The Court identified as *Bruton* error the admission of the confessions of non-testifying codefendants which interlocked with the full confession of the defendant.

The *Anderson* defendants were tried for only one of the four alleged rapes. The three defendants who had not committed this particular rape were charged as principals as a result of their participation. The four confessions admitted into evidence, however, revealed that three additional rapes had occurred and that each of the codefendants had committed one rape and assisted in three others. The Supreme Court of Louisiana found "no substantial conflict in the confessions" and held that any error was "harmless beyond a reasonable doubt." *State* v. *Anderson,* 229 So. 2d 329, 327 (La. 1969).

In reversing *Anderson* this Court seems to have established that some non-testifying codefendant's confessions are not harmless beyond a reasonable doubt despite the presence of the defendant's interlocking confession. *Anderson* does not indicate what kinds of "interlocking confessions" cases may warrant reversal, because the Court's one sentence opinion left no clues as to which were the case's crucial aspects. Respondents here submit that the Court decided in *Anderson* that a defendant's confessions, by itself, does not constitute overwhelming evidence. This interpretation, however, would mean that *An-*

derson left uncertain the amount of additional untainted evidence against the defendant which would be necessary to make the *Bruton* error harmless. Yet the uncertainty about Anderson's reach should not be confined even to this extent, because the reversal may have been based on the comparison of the tainted with the untainted evidence, rather than—or in addition to—consideration of the quantity of untainted evidence alone. If it was, then the same amount of untainted evidence might have warranted a finding of harmless error had the tainted evidence been less directly incriminating.

Schneble v. *Florida*, 405 U.S. 427 (1972), decided shortly after *Anderson*, narrowed the possible extent of *Anderson*, but supported *Bruton's* applicability to defendants who have confessed. In describing harmless error cases as those in which the "properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison", *Id.*, at 430, *Schneble* clearly separated the two underpinnings of *Harrington* and impliedly required reversal unless both were present.

Schneble and his codefendant, Snell, were convicted of murder. After originally claiming that Snell had committed the murder, Schneble made a full confession. Snell did not confess, but made an out-of-court statement which undermined Schneble's original claim and places Schneble in a position from which the murder could have been committed. The Court by

implication found a violation of the *Bruton* rule, thereby establishing at the very least that a defendant who has confessed may still claim a *Bruton* violation.

Mr. Justice Rehnquist found overwhelming evidence in Schneble's "minutely detailed" confession, which was "completely consistent with the objective evidence,"[15] *and in his guiding the police to the exact location of the body* in an "out-of-the-way" spot. *Id.*, at 430. Prior to his confession, Schneble made a statement blaming the murder on his codefendant, but this initial account failed to explain the rope burns on Schneble's hands. If we assume that *Anderson* found a defendant's confession alone to be less than overwhelming evidence, then the combination of *Anderson* and the first leg of *Schneble* requires reversal for *Bruton* error where there is no (or very little) untainted evidence aside from the defendant's confession, as in the instant case.

The second requirement for harmless error in *Schneble* was concluded by Mr. Justice Rehnquist to be that: "[T]he allegedly inadmissible statements of Snell at most tended to corroborate certain details of petitioner's comprehensive confession." *Id.*, at 431. Because the trial judge had let the jury decide whether Schneble's confession was voluntary in the

[15] The objective evidence consisted of blood, hair, and the murder weapon (all found in the car Snell and Schneble were driving when arrested), and a bullet (found, as Schneble said it would be, in the victim's head). *See Schneble* v. *State*, 201 So. 2d 881 (Fla. 1967); 215 So. 2d 611 (Fla. 1968).

course of determining the verdict, it was possible that the jury had found the confession involuntary and brought in a guilty verdict on the basis of the other evidence. The untainted evidence aside from Schneble's confession and its fruits however, was inconclusive. Snell's statement must have played a vital role in producing a guilty verdict if that verdict was indeed coupled with a finding that Schneble's confession was involuntary. With Schneble's confession thereby placed squarely behind the jury's guilty verdict, Mr. Justice Rehnquist decided that the " 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded." *Id* at 432.

Both *Anderson* and *Schneble* have some meaning in considering "interlocking confessions" cases. *Anderson* involved tainted evidence which spoke directly of each defendant's guilt; in contrast, Snell's statements at most tended to corroborate *certain details* of Schneble's confession. This does not mean that under this interpretation of *Anderson*, all defendants who are directly incriminated by codefendants' confessions merit reversal. The corroborative importance of Snell's statement was lessened on the one hand by the presence of Schneble's earlier statement denying guilt. Since *Anderson* involved neither kind of additional evidence, the area within which "interlocking confessions" cases require reversal cannot be determined by looking only at the evidence provided by the codefendants in *Anderson* and *Schneble*.

Brown v. *United States*, 411 U.S. 223 (1973), decided after *Harrington*, *Anderson* and *Schneble*, involved the Court's most recent look at "interlocking confessions." In that case petitioners were convicted of transporting stolen goods and of conspiracy to transport stolen goods in interstate commerce, following admission into evidence of full and similar confessions. The Court found the *Bruton* error, which was conceded by the Solicitor General, to be harmless error beyond a reasonable doubt. In discussing the weight of the prosecutor's case, Mr. Chief Justice Burger repeated the language of *Harrington*, which *Schneble* had omitted: "[T]he independent evidence 'is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this ... conviction undisturbed.' " *Brown*, 411 U.S., at 231. Far more than the facts in *Harrington*, the facts in *Brown* warranted this appraisal. The untainted evidence against each petitioner, aside from his own confession, included 20 photographs of the crime in progress, the testimony of policemen who witnessed the crime, and stolen goods gathered from the truck in which he has driving at the time of arrest and from a store into which he had been seen carrying boxes.

If *Anderson* turned solely on the lack of overwhelming evidence, then it continues, after *Brown*, to require reversal where no untainted evidence aside from his own confession confronts the defendant, and to permit

reversal where the additional untainted evidence is less incriminating than in *Schneble.*

Like *Harrington* and *Schneble, Brown* also looked at the tainted evidence in comparison to the untainted evidence. Mr. Chief Justice Burger concluded that "the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." 411 U.S. at 231. In its reference to "largely uncontroverted evidence," *Brown* returned to a concern of *Harrington* which *Schneble* overlooked. Where *Schneble* found harmless error in the admission of testimony which corroborated the defendant's confession while controverting his original statement, *Brown* found harmless error in the admission of testimony which agreed with the information provided by several more trustworthy sources. In another sense, however, *Brown* was not altogether within *Schneble's* limits, for the codefendant's confession in *Brown,* unlike his counterpart's statement in *Schneble,* by itself fully incriminated the defendant. Nonetheless, it is easier to say of *Schneble* that without the statement by the codefendant—to the pertinent sequence of events, the case would have been "significantly less persuasive."

If *Anderson* rested on a comparison of tainted and untainted evidence, therefore, it continues to require reversal of some "interlocking confessions" cases after *Brown.* The tainted evidence in *Anderson,* like that in *Brown,* fully incriminated each of the defendants. But far from dwarfing the tainted evidence, as in

Brown, the untainted evidence against each *Anderson* defendant consisted of only one confession, corroborated by three tainted confessions.

Therefore the logical conclusion to be drawn from *Harrington, Anderson, Schneble* and *Brown* is that it is not always harmless error when a nontestifying codefendant's confession incriminates a defendant who has made an "interlocking confession." Neither of those cases destroyed the vigor and vitality of *Bruton,* but reinforced it.

In the instant case the confessions and statements of Randolph, Pickens and Hamilton were very "vital to the government's case." At no time has the State contended that either respondent fired the fatal shot, robbed the game or was arrested at the scene with any weapons or money from the game. It's basic contention is that respondents were part of "a plan to rob" the game, with Robert Wood and his brother, Joe. If no "planning" link had been established between Robert Wood and the respondents, obviously they could not have been found guilty of murder in the perpetration of a robbery.

By considering the two conflicting statements of Robert Wood in the light "most favorable" to the state and *all* the other evidence in the record, aside from respondents' statements and confessions, there is *no* proof whatsoever, that respondents ever met (among themselves, nevertheless with any body else) to plan the robbery.

It is *only in the confessions and statements* of respondents is there any mention or reference to a meeting (with Joe Wood) to plan the robbery and their presence at the scene of the crime, both crucial elements of the offense.

Each respondent's statement makes reference to the involvement of the other in the plan and/or at the scene of the crime and afterwards. It is obvious, from a reading of the statements, that the omission of the specific names of the other parties, was meaningless. Once the prosecutor in the joint trial gave his opening statement to the jury of his intention to prove the joint participation of the co-defendants on trial, it made no difference, whatsoever, as the state would lead this Court to believe, that the substitution of such words as "a friend", "this friend", "we", "they", "he", "the party", "other party", "a guy's house", "him", "one guy", "two others", for the specific names would remove from the jury's mind and consideration the references of the confessor to the other defendants on trial.[16]

Therefore the District Court and Sixth Circuit Court of Appeals were correct in holding that the

[16] In *Harrington* the Court stated that the circumstances of the case and the details of the confession may make it "as clear as pointing and shouting that the person referred to was" the co-defendant. 395 U.S. at 253. See also, *United States* v. *DiGilio*, 538 F. 2d 972, 983 (3rd Cir. (1976) where petitioner's name was substituted in the co-defendant's statement with the word "blank."

Bruton *error* existed in this case when the statements and confessions of the respondents were admitted into evidence and neither one of them took the stand to testify or was available for cross-examination by his co-defendants.

II

THE ADMISSION INTO EVIDENCE OF RESPONDENTS' STATEMENTS AND CONFESSIONS IN VIOLATION OF THE BRUTON RULE WAS NOT HARMLESS ERROR.

In the cases decided since *Bruton*, this Court has stated very clearly that *Bruton* errors can, nevertheless, be harmless under appropriate circumstances. *Harrington* v. *California*, *supra*, *Schneble* v. *Florida*, *supra* and *Brown* v. *United States*, *supra*. In determining the "appropriate circumstances", a careful analysis of the evidence presented to the jury in each case must be made.

In *Chapman* v. *California*, *supra*, this court refused to allow a state to apply its harmless error standard and said that the admission of evidence which violates a federal constitutional right can be ruled harmless error only *under the federal standard for harmless error* that "the court must be able to declare that it was harmless beyond a reasonable doubt." *Id.*, at 24. 386 U.S. at 24.

The *Chapman* Court adhered to its holding in *Fahy* v. *Connecticut*, 375 U.S. 85 (1964) which stated that:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial",

[*Id.*, at 86-87].

Harrington v. *California*, *supra*, specifically affirmed *Chapman*. Mr. Justice Douglas, in his majority opinion said that:

> "We do not depart from *Chapman*; nor do we dilute it by reference. We reaffirm it ... *The case against Harrington was not woven from circumstantial evidence. It is so overwhelming* that unless we say that no violation of Bruton can constutite harmless error, we must leave the state conviction undisturbed."

[*Id.*, at 254] (emphasis added).

Mr. Justice Brennan, the author of *Bruton*, expressed reservations about the Court's holdings in *Harrington* concerning the "overwhelming" untainted evidence to support the conviction. He stated in his dissent that:

> "The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence."

Id., 395 U.S. at 256.

There are contradictory factual conclusions that can be reached in this case by a consideration of all

the evidence in the record, including the confessions of respondents. The Court may make its independent examination of the facts, findings, and the record to determine whether the fundamental "constitutional-criteria established by this Court have been respected." *Ker* v. *California*, 374 U.S. 23 (1963). The result of such examination may disclose a gross miscarriage of justice in the conviction of these respondents of "murder in the perpetration of a robbery", where they neither murdered the victim nor robbed the poker game.

The evidence admitted at the trial for the jury's consideration included the following: (a) the testimonies of five (presumably imparial) witnesses who testified as to facts they observed outside the apartment just before and after the shooting, (b) the redacted statement of Robert Wood taken before he was charged with the shooting, (c) the testimony of Tommy Thomas, an eyewitness to the shooting, (d) the in-court testimony of Robert Wood, (e) the oral statement of Isaiah Hamilton (introduced through the testimony of a police officer), (f) two oral statements of James Randolph (introduced through the testimony of two police officers), and (g) the redacted statement of Wilburn Lee Pickens (introduced through the testimony of a police officer). The other statements purportedly made by Hamilton and Pickens should not be considered on the question of harmless error because they were not presented to the jury.

Of the five witnesses who observed events outside the apartment, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment *after* the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing "a white man and three blacks" at the apartment at the time the robbery was committed.[17] Neither witness, however, could identify either of the respondents as those blacks (colored men) at the scene. Nor did either of those witnesses say that they saw the unidentified blacks with any pistols or shotguns in their hands outside the apartment door.

In his first (redacted) statement to the police,[18] Robert Wood, said he didn't know who picked up the money off the table after the "three guys" kicked in the door. (A. 84) The victim had a .38 caliber revolver in his pocket that he reached for when the door was kicked in. (A. 85) No other person was with them (the three) and came into the room (A. 86). When asked if he could identify either of the three suspects if he saw them again, he said "I doubt it." (A. 90) Also, he couldn't recognize any of the suspects in the police photos. (A. 91) He could not specifically describe the kind of clothing any of the suspects had on because things happened so fast. (A. 89-93)

[17] See Footnote 23 of Brief For Petitioner.

[18] In the form it was presented to the jury is contained at pages 61-106 of the Appendix.

In his testimony at trial,[19] Robert Wood said that the victim was armed with a .38 caliber pistol and an automatic shotgun. (A. 114) He shot the Las Vegas gambler (with a .22 caliber derringer) after the victim went for the gun in "his waist band." (A. 116) A few seconds thereafter, "three colored guys" came in, and he thought one of them "fired a shot into the wall." (A. 116-117) He said Hamilton was one of the blacks that came into the room. He knew him as one who had worked for his brother for six (6) years. But, he did not know either Randolph or Pickens and had never met either of them. (A. 117) Robert Wood said *he* picked up most of the money off the table and "stuck it in my pocket." (A. 117) He didn't know what happened to the rest of the money (if any was in fact left). He carried the .22 Derringer from the apartment. (A. 118) Robert Wood did not say what, if anything, the three blacks carried from the apartment. They left the apartment before he, Joe Wood and Tommy Thomas. (A. 118) When asked on cross-examination about the "robbery plan", Robert Wood said his brother, Joe, told him "he would bring someone with him" to help get his money back *if he caught the man cheating* and he did not voluntarily give the money back after demand. Robert said he "didn't know exactly who or how many" would be coming with Joe, if anybody. (A. 127-129 See also A. 147-148) He further said, he didn't know if these people who were supposed to help, knew where the

[19] Appendix, pages 106-150.

place (apartment) was. He "assumed" Joe told them. Neither did he know whether they would be "armed or unarmed." (A. 148) He didn't discuss it (with Joe). (A. 130) He "assumed" that Pickens and Randolph were among the three blacks who entered the apartment after the shooting because he said he met "them" later at Hamilton's apartment. (A. 136) When asked directly whether any of the male blacks who entered the apartment had a .38 pistol, Robert Wood said, "*I don't know what kind of weapons they had if they had weapons*" ... (A. 137) Besides the .38 revolver and shotgun (possessed by the victim) and the .22 Derringer (which he carried from the apartment) Robert Wood said there was also another gun in the (his) car when he "ran to the car" in the parking lot. (A. 137) The car carrying the three blacks had left the scene earlier, but Joe spotted it on the interstate and said "follow them." (A. 139) Robert Wood said he knew the weapons in the apartment were taken "by someone" and hid in Hamilton's apartment. (A. 140-143) He couldn't say "for sure" whether his brother was the one who asked Hamilton "to hide those guns." (A. 143) He claimed that all five of them went into Hamilton's apartment but said "*I went in there for a second and I left* and went back to the car and Joe was in there a little longer than I was." (A. 143) When asked directly whether the three blacks (including Hamilton who he said he knew) were in the apartment with him and his brother, he said "I think so, I'm not sure." (A. 144.)

All of the above paragraph constitutes the gist of Robert Wood's testimony before the jury. No where, does he state where and when the respondents met with Joe Wood or anybody else to "plan the robbery." His identification of petitioners as being at the scene of the crime is based upon his assumptions after having met them "for a second" at Hamilton's house and was contrary to his first statement to the Police. He does not claim to have given respondents any money for their "participation in the crime", though he apparently had taken all of it from the poker table. His testimony does not disclose what weapons, if any, the blacks had in their hands when they entered the room. Also, Robert admitted that he, Joe Wood, and *Tommy Thomas* met after the incident over Thomas' girl friend's house to agree on a plan to place the murder and robbery on three unidentified blacks. (A. 120).

The testimony of Tommy Thomas, is basicly consistent with the in-court testimony of Robert Wood. Despite Thomas' involvement and presence at the games and knowledge of the cheating and other details, he was not charged with anything relating to this offense. He even claimed that he didn't know whether Joe Wood entered the apartment with "the three male Negroes," although the testimony from the impartial witnesses seem to show that Joe was the one who was first at the door and did the kicking. Nevertheless, Thomas, the only other eyewitness to the murder and robbery could not identify the re-

spondents as those "three Negroes" who came into the apartment after the shooting. (A. 211).

The only other remaining evidence considered by the jury was the "tainted" confessions of the respondents. The trial judge admitted these statements into evidence, despite "some rather vivid coercion complaints"[20] and allegations of denial of constitutional rights.

On the issue of voluntariness of the confessions, Hamilton testified outside the presence of the jury,[21] that his confession was coerced and that he did not make the statements attributed to him. He also stated that he only had a third grade education and could not read or write. It may have been for this reason that the State elected not to introduce Hamilton's written statement.

Randolph testified, outside the presence of the jury,[22] that he was physically abused during his interrogation and punched in the stomach by the interrogating officers. He also testified that he was not advised of his rights until after he had made the statements.

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[20] See *Randolph* v. *Parker*, supra, where Circuit Judge Edwards observed that "It should be noted that at the original trial, motions to suppress the Randolph and Pickens statements were made on grounds of physical abuse and threats, but were denied by the state court trial judge after some rather vivid coercion complaints. 575 F. 2d at 1180.

[21] Hamilton testified two times, beginning at pages 473 and 515 of the trial record.

[22] Randolph's testimony begins on page 596 of the trial record.

Pickens also testified, outside the presence of the jury[23] that he was subjected to considerable abuse, threats and undue pressure from the police officers and that the statement he signed was not his own. He also testified that he was not allowed to contact his lawyer, before making a statement. Both the District Court and the Sixth Circuit have agreed with Pickens on that issue. The record also shows that Pickens was nearsighted and that his eyeglasses were taken from him at the police station and he could not read the statement he signed.[24] But, it is Picken's statement which is the "most damaging" of the three on the material issues.

The Trial Judge instructed the jury that a statement must be voluntary to be considered as competent evidence.[25] It also instructed the jury after the reading of each confession not to consider the statements as they relate to any other defendent.[26] A careful reading of the record however, makes it difficult to determine what evidence the jury believed or even considered in convicting Randolph, Pickens and Hamilton of felony-murder besides their confessions.

The only statement of any pre-plans to rob the poker game is contained in the three similar statements of Randolph, Pickens and Hamilton.

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[23] Pickens testimony begins on page 689 of the trial record.

[24] See pages 704-706, Trial Record.

[25] See page 942, Trial Record.

[26] See pages 777-778, Trial Record.

A close examination of the confessions themselves do not disclose that Randolph and Pickens had "planned" very long before going with Hamilton to the scene of the poker game that night. The confessions, though similar in some respects, are inconsistent, illogical and secured under questionable circumstances. They do not interlock with the necessary quality to constitute, by themselves, that "overwhelming evidence" talked about in *Harrington*, *Schneble* and *Brown* to render a *Bruton* violation harmless.

Hamilton's oral statement (A. 160-162) read to the jury said that a man he worked for "told him to find two other parties to meet him at the apartments." (A. 161). It also said that they heard a shot from inside the apartment, the door was kicked open and they saw the victim on the floor and "another party in there waving a .22 stack barrel gun . . . at this time they turned and ran back to the car and returned to [his] apartment on Haynes at which time they were met by two other parties, who gave them some guns at which time [he] hid them in his attic." (A. 161-162).

Nowhere in Hamilton's statement read to the jury is there any mention of a plan "to rob" the poker game. Nor does the statement show that he or any of the "two other parties", had any kind of weapons at the scene or received any money thereafterwards for their involvement. The statement doesn't even say that they entered the apartment. Therefore, assuming

arguendo, that Hamilton's statement could be considered against him in a separate trial, there would not have been that degree of evidence "beyond a reasonable doubt" to have convicted him of "murder in the perpetration of a robbery."

In Randolph's first statement (A. 162) read to the jury he said that he was at his home (about an hour and a half before the shooting) and "was preparing to go to the wrestling matches" with his wife, when a "friend in a GTO convertible" came to his house and insisted that he go with him and "two more of his friends out there in the car." (A. 162).

There is nothing in the statement to indicate that he knew of a plan to rob anything, or where the friends were supposed to be going or that any of them had weapons, or entered the apartment after the shooting or that he received anything for his alleged participation in the robbery.

The second statement of Randolph (A. 163-164) however omits reference to the pre-plans of he and his wife to go to the wrestling matches and gives some detail of his having been apprised of the "robbery" plan by "the party in the GTO convertible." It further states that at the scene after the door was kicked in "another party" fired a shot into the wall to scare the other party that was waving the pistol. They ran from the apartment, went to "another party's" apartment, "were shortly joined by *two other parties* who gave *them* $50.00 a piece and some guns

which were hid in *another party's* attic. Randolph supposedly had a .38 revolver, *another party* had a .38 and *another party* had a sawed-off shotgun. (A. 163-164).

Only in the second oral statement of Randolph is there any mention of the three respondents receiving any money ($50.00) from the "two other parties" who joined them. Robert Wood never testified or gave a statement that he gave the three blacks any thing after the shooting. Only in Randolph's second statement does he identify he and his two accomplices as having any particular weapons, to wit, two .38 revolvers and a sawed-off shotgun. The two "other parties" clearly refers to Hamilton and Pickens.

In Pickens' written statement, (A. 170-176) which was secured in violation of his right to counsel under *Miranda* and signed without his being able to read the contents thereof, stated that he went over "a guy's house to see his sister-in-law about an hour before the shooting when "another guy" came by. (A. 171). They left there going to "some girl's house over on Lauderdale and Mallory (Streets)." They were there about half an hour drinking beer. They left there and went to "Mary's Place" on Boile Street for "a picnic"; they were there about twenty-five (25) minutes. Then they left and went to Airways and Winchester, where they met this fellow who they were to follow to the Krystal Restaurant. The other fellow stopped at the drive-in grocery store next to the Krystal, got some beer and they went back to the

parking lot near the crime scene. After two of them in the car were beckoned by "the guy" to come to the apartment where the gambling was going on, "*we* all jumped out of the car. *One guy* had a sawed-off shotgun. *One* had a pistol. I think it was a .22. I had a .38 revolver." (A. 172). The statement goes on to detail the involvement of all three of the parties (respondents) in the crime, consistent with the State's theory, including the plan to rob the poker game (A. 174) and his having been told of the plan "about a week and a half before the incident and two of them having been taken to the scene beforehand. (A. 174-175).

Clearly, Pickens confession, which is "very tainted", is the most damaging statement of the four heard by the jury. It details the respondents' alleged participation in the crime. It is similar in many respects to Randolph's second statement and contrary to most of the things in Hamilton's oral statement and Randolph's first statement read to the jury. The references in Pickens' statement to "we", "two of you all", "one guy", "the other three guys", "the two others", "they", and "us" obviously refer to Hamilton and Randolph and in a few instances to Joe Wood. The conclusions are clear, especially after the jury has been apprised of the government's theory of the case.

It does not "appear" in the confessions of Randolph or Pickens that they had "planned" or made preparations in advance to go to the scene of the crime before the "other party" arrived in the GTO. Also, it

is illogical that they would have gone to a girl's house to drink beer and later to a picnic "over Mary's" with .38 caliber pistols on them, if they had previously planned to rob the poker game an hour later. Neither statement indicates where or when they picked up the pistols and sawed-off shotgun. Pickens statement says he never went to Hamilton's apartment after the shooting, and therfore did not receive the $50.00 referred to in Randolph's statement.

Therefore, the confessions themselves do not contain that logical and credible information which the State contends "corroborates" the other evidence. It is thus reasonsable to conclude that Randolph, Pickens and Hamilton were victims of circumstances, innuendo, and involuntary statements containing untrue information. The jury after having heard all the evidence and testimony probably could not distinquish one confession from the other. They could well have rejected all of Robert Wood's testimony in Court in light of his prior inconsistent statement and efforts to justify his theory of self-defense.

The "interlocking confession" theory which has been adopted by the Second Circuit, [27] with reservations,[28] as an exception to *Bruton*, is not founded

[27] *United States ex rel. Cantazaro* v. *Mancusi*, 404 F.2d 296 (2nd Cir. 1968), cert. denied, 397 U.S. 942 (1970).

[28] In *United States ex rel. Ortiz* v. *Fritz*, 476 F. 2d 37, 38-40 (2d Cir.) cert. denied, 414 U.S. 1075 (1973) a panel of the Second Circuit questioned the "interlocking" confession doctrine but felt bound to follow it by citing *Cantazaro*.

upon any decision of this Court. But is a misinterpretation of the Court's holding in *Bruton*.

The Sixth Circuit's decision in this case addresses the issue of interlocking confessions only in response to the State's contentions and reference to the opinion of the Supreme Court of Tennessee, but does not say that these confessions interlock.

The interlocking confession theory has been the result of varying efforts to determine the question of "harmless error" as applied to individual factual situations.[29]

This theory in effect states that a Court may admit into evidence hearsay testimony depending upon the contents of said statement and how it compares favorably with other (normally) admissible evicdence. Such a position disregards the basic principles of the Sixth Amendment to the United States Constitution and *Bruton*. Hearsay is Hearsay. It cannot be cured because it is the same or similar to another statement. To reach this conclusion would be to say that because the confessions are "similar" in content and corroborate each other that they are admissible, even though neither co-defendant was present when the other gave his statement nor was able to cross-examine each other in Court.

The summary of the evidence and testimony against these three respondents was not "so over-

[29] See Footnote 3 of *Randolph* v. *Parker*, 575 F. 2d at 1184.

whelming" as to render the improper admission into evidence of their statemensts harmless beyond a reasonable doubt.

CONCLUSION

The respondents, James Randolph, Wilburn Lee Pickedns and Isaiah Hamilton respectfully submit that clear *Bruton* violations occurred when their statements were admitted into evidence without the opportunity for cross-examination of each other, and that this error was not harmless beyond a reasonable doubt under *Chapman* v. *California.* For all of the above mentioned reasons this Court should affirm in total the decisions of the District Court and Sixth Circuit Court of Appeals and fortify those precious rights to confrontation and cross-examination outlined in *Bruton* and the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

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